

MAR 25 1993

***DROIT DE SUITE:***  
**THE ARTIST'S RESALE ROYALTY**

**APPENDIX**

**Part I Comment Letters**

**Part II Transcript of San Francisco Hearing**

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**DECEMBER 1992**

**A REPORT OF THE  
REGISTER OF COPYRIGHTS**

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RM 91-1

## ***DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY***

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### **PART III - Transcript of New York Hearing**

DECEMBER 1992





# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

## NOTICE OF INQUIRY

### REQUEST FOR INFORMATION; STUDY ON RESEAL ROYALTIES FOR WORKS OF ART

The following excerpt is taken from Volume 56, Number 22 of the Federal Register for Friday, February 1, 1991 (p. 4110)

#### LIBRARY OF CONGRESS

##### Copyright Office

[Docket No. RM 91-1]

##### Request for Information; Study on Resale Royalties for Works of Art

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of inquiry.

**SUMMARY:** This Notice of Inquiry advises the public that the Copyright Office is conducting a study on the feasibility of legislation requiring purchasers of works of art to pay to the artist a percentage of the resale price of the art work. This notice invites comments and information that will assist the Office in understanding the issues involved in such a requirement. The Office particularly invites comment from groups or individuals involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, auction houses, investment advisors, collectors of fine art, and curators of art museums.

**DATES:** Initial comments should be received by June 1, 1991. Reply comments should be received by August 1, 1991.

**ADDRESSES:** Interested persons should submit ten copies of their written comments to Office of the Register of Copyrights, Copyright Office, James Madison Building, room 403, First and Independence Avenue, SE., Washington, DC 20559.

**FOR FURTHER INFORMATION CONTACT:** William Patry, Policy Planning Advisor to the Register of Copyrights, Copyrights Office, Library of Congress, Washington, DC 20559. Telephone: (202) 707-8330.

**SUPPLEMENTARY INFORMATION:** On December 1, 1990, President Bush signed into law Public Law 101-650. Title VI of this legislation contained provisions according certain rights of attribution and integrity to works of the visual arts. The title is generally effective on June 1, 1991. Section 608(b) of the legislation also mandated that

(1) The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

(A) A requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(B) Other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

The report is to be presented to Congress 18 months after the date of enactment (June 1, 1992). The present notice is designed to assist the Copyright Office in fulfilling this mandate.

#### *Droit De Suite*

Resale royalty rights, commonly called *droit de suite*, were developed in Europe as a method of permitting artists to share in the increased value of their works. The Berne Convention permits member countries to extend *droit de suite*, but does not require them to do so. Article 14ter. Few countries have *droit de suite* regimes. In the United States, federal copyright law does not provide a resale royalty right, and among the states, only California has enacted a *droit de suite* provision. There are a number of different approaches to *droit de suite*, taking into account factors such as the type of work, the sales price, who is selling the work, and whether the sale is public or private. The

effectiveness of the laws in achieving their desired goals has been the subject of dispute.

During the 100th Congress, hearings were held on H.R. 3221 and S. 1619, predecessors of Public Law 101-650. Section 3 of the bills contained a *droit de suite* provision. Due to opposition to the provision, it was dropped from subsequent bills with the understanding that the present study would be undertaken.

In order to assist in completing the study, the Copyright Office seeks comments on the following questions:

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications

of such decisions? How is the issue handled in foreign countries and in California?

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and

in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

6. Should the right be waivable or alienable?

7. Should the California law be preempted in the event of a federal law?

Interested parties are free to comment on other issues not raised in these questions.

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, in room 401, James Madison Memorial Building, Library of Congress, First and Independence Avenue, SE., Washington, DC 20559.

Dated: January 24, 1991.

Ralph Oman,

*Register of Copyrights.*

[FR Doc. 91-2419 Filed 1-31-91; 8:45 am]

BILLING CODE 1410-07-M

**PART I - Comment Letters**

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**Resale Royalties for Works of Art**  
**Docket No. 91-1**

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V/

March 17, 1991

Copyrights Office  
Library of Congress  
Washington, D.C. 20559

Attention: William Patry (202)707-8350

Gentlemen:

I am writing to record my strong objection to providing royalties to artists for the profitable resale of their work. There are many things wrong with that concept, but to mention a few:

- The increased value may be due to inflation.
- The increased value may be due to who has owned the work rather than who created it.
- The artist would share in the increased value arising from the risk that the purchaser took in buying the work, but not in the loss (which is the more usual scenario).

In other words, the concept is grossly unfair.

  
Walter L. Baumann

Comment Letter
RM 91-1
No. <u>1</u>

May 27, 1991

Office of the Register of Copyrights  
James Madison Building, Room 403  
First and Independence Avenues, SE  
Washington, DC 20559


MAY 30 1991

As a visual artist, I have the following comments on legislation requiring purchasers of works of art to pay resale royalties:

- Artists should receive resale royalties, regardless of who pays them.
- Resale royalties would benefit me financially and, if they did so significantly, I would be able to create more works than if I did not have those resources.
- I doubt if royalties would greatly affect the market for art works.
- Royalties should be collected by the professional dealers involved in the resale or, in case there is no dealer involved, the seller should be responsible.
- Enforcement should be based on the honor system but provisions in the law should levy stiff penalties for noncompliance. For example, leaving those not complying open to suit wherein damages are awarded.
- The right to resale royalties should not be waivable as artists may come under undue pressure to do so.
- If legislation as previously proposed is unacceptable to dealers and collectors and others like them, a compromise should be struck. Artists should be entitled to resale royalties, especially on appreciated works, regardless of the form and terms of the legislation.

It is very hard to make a living as a visual artist in this country. With public sector funds drying up - and perhaps disappearing - our legislators must do something to support living American artists.

Respectfully submitted,

  
Yanick Lapuh, Painter

Comment Letter	
RM	91-1
No.	2

RECEIVED

JUN 6 1991

OFFICE OF REGISTER  
OF COPYRIGHTS



SMITHSONIAN INSTITUTION

Washington, D.C. 20560  
USA

May 31, 1991

Mr. William Patry  
Policy Planning Advisor  
Office of the Register of Copyrights  
Copyright Office  
James Madison Building - Room 403  
First and Independence Avenue, S.E.  
Washington, D. C. 20559

Dear Mr. Patry:

The Copyright Office's Notice of Inquiry requested comments concerning its study on the feasibility of legislation requiring purchasers of works of art to pay to the artist a percentage of the resale price of the art work.

I am writing at this time simply to convey information you may find useful in completing your study of the issues involved in such a requirement, rather than to address the seven questions presented in the February 1, 1991 Federal Register Notice. Enclosed are two articles authored by Stephen E. Weil, the Deputy Director of the Hirshhorn Museum and Sculpture Garden. One is a brief piece in this month's ARTnews (May, 1991) and the other an extended article written more than a dozen years ago in ARTnews (March, 1978). Mr. Weil's comments are thoughtful and important in understanding the scope of resale royalties issues, and I request that these comments be considered by the Copyright Office. As he notes at the close of his 1978 article, Mr. Weil does not speak for the Smithsonian Institution or the Hirshhorn.

Thank you for the opportunity to present this submission.

Sincerely,

*Peter G. Powers*

Peter G. Powers  
General Counsel

cc: Stephen E. Weil

Comment Letter

RM 91-1

No. 3



# RESALE ROYALTIES: Nobody benefits

The proposed national resale royalties bill will do 'enormous harm' to the contemporary art market and adversely affect the economic well-being of most artists. There are better alternatives

by STEPHEN E. WEIL



Are visual artists really at a disadvantage? Who profited most from his art, asks the author: Mann, Stravinsky or Picasso?

That American artists should, through their own creative efforts, be able to sustain themselves—and to sustain themselves with greater dignity and more adequate means than many can do today—is not merely socially desirable. It is a national necessity. In an environment that increasingly stresses corporate accomplishment and technical skills, the importance of artists becomes correspondingly greater. They are among the last role models we have of free imagination, transcendent aspiration and—above all—individual effort and responsibility. Beside whatever contributions their work can make to our accumulated cultural heritage, artists in their own selves are more than ever vital to maintaining the balance of our national life.

Stephen E. Weil is a museum official, attorney and author who has specialized in the legal problems of contemporary art and artists for the past 15 years. With Franklin Feldman, he was the co-author of *Legal and Business Problems of Artists, Art Galleries and Museums* (1973) and *Art Works: Law, Policy, Practice* (1974). He was administrator of the Whitney Museum of American Art from 1967 to 1974 and is presently serving as deputy director of the Hirshhorn Museum and Sculpture Garden, Smithsonian Institution.

Recognizing that artists require a more adequate support system than American society now provides, legislators at both the state and the federal level have shown increasing interest in finding other means to help them. One proposal, strongly championed by a number of artists and by many artists' groups, would do so by the establishment of resale royalties.

To question, as I shall, both the principles underlying this proposal and, regardless of the soundness of these principles, the utility of any legislation that would establish such royalties is to risk being misunderstood as indifferent or even hostile to the well-being of artists. I hope that I am neither, and I would hesitate to raise such questions publicly were I not convinced so strongly, first, that the establishment of resale royalties, far from helping artists or having only a neutral impact, would in fact be positively harmful to their interests and, second, that it is critically important that those who wish to help artists take advantage of this current surge of legislative interest by concentrating their efforts on alternative measures that would do so by increasing—rather than, as resale royalties threaten to do, diminishing—the funds now available for the purchase of con-

*Analogy and image.* Underlying the proposal for artists resale royalties are an analogy and an image.

The analogy is to the means by which authors and composers have traditionally been compensated. Implicit is the suggestion that, by reason of their right to receive royalties, these other creative workers enjoy an advantage that visual artists are denied. This was clearly expressed in one of the seminal documents of the present campaign for resale royalties, the Art Proceeds Act proposed in 1966 by Diana B. Schulder in the *Northwestern University Law Review*. Section 2 provided: "Since a painter or a

sculptor who creates a unique work of art does not benefit from the fruits of his labors as does an author or composer who derives royalties from the reproduction or performance of the work, this act, by allowing an economic right upon re-transfer, is intended to ensure to artists a parallel benefit."

The image coupled with this analogy is that of a collector who, having purchased a work of art for relatively little, resells it for a great deal more, pocketing the entire profit and leaving the artist, whose effort first created the work and whose subsequent accomplishments may have contributed to its increase in value, with no part of such increase. It is the image of Robert Rauschenberg and Robert Scull in tense confrontation after the 1973 auction at which Scull resold for \$85,000 a work for which he had originally paid Rauschenberg less than \$1,000.

If the establishment of resale royalties is to be founded upon some sound principle, then, at the outset, two questions must be asked. Is this underlying analogy correct, and does this underlying image—unquestionably distressing in its suggestion of a collector unjustly enriched at an artist's expense—reflect some common situation or only an occasional, albeit highly visible,

*Planters, poets and others.* Would the grant to visual artists of some continuing economic interest in their work, the realization of which would be dependent on the resale or successive resales of such work, in fact be a "parallel benefit" to the royalty rights now enjoyed by other creative workers? Clearly, it would not. The royalties that authors and composers receive are based on the multiple initial sales of their infinitely reproducible efforts. For each additional copy of a novel printed and sold, the author may receive additional compensation. So may the composer for each additional performance of a musical composition. For that matter, so too may the visual artist who elects to sell additional copies of an infinitely reproducible image of a work of art rather than the unique object in which the work itself is embodied.

This is not the case with a resale royalty. In the case of a resale royalty, no additional example of the original work is being brought into being nor is the work itself being put to any broader use. The event that would cause the proposed royalty to be paid would, instead, be the substitution of one owner for another. It would be as if Norman Mailer could claim some further payment for each copy of *The Naked and the Dead* resold in the secondhand book market above the \$4 price at which it was originally published in 1948 or as if an architect could claim some share of the proceeds when a house he designed was subsequently resold at a profit. No such right exists today.

What is proposed here, then, is the establishment of a new right—one very different from a royalty and one that does not extend naturally from existing concepts of property and ownership. Whether such a special right should be established for artists is a larger, open and arguable question, but not one that can be answered by a simple analogy to the royalties payable to authors and composers.

Might the establishment of this special right be justified, then, on the ground that the traditional method by which artists have been compensated places them at a disadvantage to other creative workers? It might, if this were so. It appears, however, not to be so. If we exclude such supplementary income-producing activities as teaching, lecturing or wholly unrelated employment—none of which relates to the question of royalties and some of which normally supplement the art-derived income of most creative individuals—and exclude as well the grotesquely inflated earnings of such mass-appeal entertainers as rock stars or gothic novelists, visual artists would seem to be consistently better compensated for their creative effort than their peers in the other arts.

To make such comparisons is awkward. Real names must be used, and virtually no one will agree with particular comparisons. Nevertheless, if you compared the probable art-derived income of creative individuals of comparable seriousness, achievement and popularity, how well would visual artists fare? Consider Pablo Picasso in relation

to Igor Stravinsky or Thomas Mann; Marc Chagall to Vladimir Nabokov or Béla Bartók; Henry Moore to Benjamin Britten or W.H. Auden; the fifth best earner of the Castelli Gallery to the fifth best earner among the Yale Younger Poets. Make your own comparisons. If you do it fairly, I believe you will find that the earnings of visual artists—no matter how inadequate such earnings may be in themselves or how poorly they may compare with those of individuals outside the arts—are nevertheless consistently above the earnings of those of their peers who are compensated by royalties.



There are reasons why this should be so. That a work of visual art is traditionally embodied in a tangible, physical object rather than—as in the case of literature or music—expressed through such infinitely reproducible media as words or sounds has more than esthetic implications. Beyond the fact that their value is influenced—if not largely determined—by scarcity, works of art do not require the same level of demand as do works of literature or music to secure their creators a living. A painting needs no initial market larger than a single buyer in order to be sold. Two potential buyers, by

themselves, can provide the basis for a successful auction. A hard-core audience of 200 faithful collector-buyers might guarantee an artist's livelihood. By contrast, a poet or novelist—able, perhaps, to realize a \$2 royalty on the sale of each hardcover copy of a book—would require thousands, if not tens of thousands, of reader-buyers to earn any continuing support from the sale of his work.

If this is so—and if the difference in the way in which they have traditionally been compensated has been an advantage, rather than a disadvantage, to visual artists—then we must look elsewhere for some basis by

Robert Rauschenberg's *Thaw*, bought for \$900 in 1958 by Pop collector Robert Scull, resold in 1973 for \$85,000.

which the establishment of a resale royalty might be justified.

*The argument of unjust enrichment.* We know that there are collectors who, from time to time, have made a great deal of money from buying and reselling works of art. We know too that some artists whose work has been involved in these transactions feel that they have been "ripped off" as a result. What we do not know, however, is



whether this happens very often. That is only the tip of our ignorance. Confining our consideration to works of art by living American artists, we also do not know, for example:

- The annual dollar volume, number and price level of primary sales (sales from the artist or dealer to a first collector).
- The ratio these bear to the overall market for art, antiques, antiquities and other competing "collectibles."
- The number of those works sold in the primary market that are ever resold in the secondary market, and the interval between such sales.
- Of the works resold in the secondary market, the number that are sold at more and the number that are sold at less than their initial price and, in each case, the dollar volume involved.

Beyond this, we have only the haziest idea of how many American artists there are for whose work there even is a regular primary market, for what number of these there is also a secondary market, of how many buyers "collect" art in any significant way and of how many such buyers ever resell the works they buy.

We remain, thus, stalled at our original question: How common is the situation that provoked the Rauschenberg-Scully confrontation? Is it one that is constantly repeated across the country, with large numbers of collectors reaping "windfall" profits by reselling the work of a larger number of artists? Or is the resale market for contemporary art confined largely to the work of a relatively small group of well-known artists whose work is bought and sold chiefly by "blue-chip" collectors?

Certainly, if it proved that some substantial number of transactions were involved, and if there were general agreement that the ability of collectors to reap such windfall profits had within it an element of unfairness, there might be some warrant for adopting national legislation that would impose some additional tax—which need not necessarily be one payable to artists—beyond the state and federal income taxes to which such profits are already subject.

Even here, though, it would be difficult to know what, except in the most extreme cases, would be meant by a "windfall" or even—always a problem in calculating taxes—what would be meant by a "profit." If, between the time he bought and resold it, the net after-selling-cost value of a painting in a collector's hands increased by no more than the current rate of inflation, was he unjustly enriched? What if the increase just equaled the interest paid on funds that he might have borrowed to purchase the painting in the first place? What if the increase just equaled the expenses incurred during ownership for insurance and/or conservation? What if he bought and sold two paintings by the same artist, profiting as much on one as he lost on the other?

And what if all of these—inflation, interest cost, the expenses of ownership and

gether? While something may be sensed as unfair in a collector buying a work of art for \$10,000 and selling it the next year for \$50,000, to what extent do we sense it unfair if a painting, or anything else with a secondhand value, is bought for \$10,000 and resold for \$15,000 some ten years later?

To justify a resale royalty on the basis that it would ameliorate some widespread injustice done by collectors to artists would require considerable information beyond what we now have. Moreover, to achieve acceptance as fair and reasonable, it would require a mechanism more sophisticated than those proposed thus far to determine when, and in what amount, such a royalty might be appropriate. If windfall profits from the sale of contemporary art are, in fact, a substantial problem, that problem should be addressed by some measured re-



The royalties received by authors and composers are based on multiple sales of their infinitely reproducible efforts. But artists sell unique objects.

sponse and not by a dramatic gesture that, regardless of any immediate satisfaction it might give, could neither be justified to those it would affect nor be of benefit to those on whose behalf it was made. Frustration and anger, real as they may be, are not a sound basis for national legislation.

**The one-way connection.** A further argument made in support of resale royalties is that their establishment would give legal recognition to—as well as symbolize—a continuing connection between the artist and a work of art after it had once been sold. In so doing, it would move American law closer to those Continental systems that recognize a *droit de suite*, from which the con-

well as a *droit moral*. Their right to receive resale royalties would, in effect, be the "umbilical cord" through which artists would maintain an ongoing relationship with their work.

The justice of this argument fades, however, when we realize how one-sided this ongoing relationship would be. It would not require the artist to bear any part of a collector's ongoing expenses, such as those for insurance or conservation. Neither would it impose on the artist any greater liability than heretofore for the instability or failure of the materials or workmanship he might have employed in his work. Above all, the proposed umbilical cord would only carry gains, carefully filtering out any losses that collectors might incur on the resale of those works to which the artists would otherwise remain connected.

Certainly, no one seriously proposes that the artist—or the artist's heirs for 50 years after death—should be liable for a refund of five percent of the initial purchase price whenever a collector is unable to resell a work of art for the amount it originally cost. For many artists, the contingent liability might well exceed their total worth. At the same time, however, it is difficult to accept as just a proposed form of partnership in which one of the partners would bear all of the risks while the other enjoyed the luxury of sharing in profits only.

**Art in a commodity market.** To all of the foregoing, it may in some fairness be replied: so what? If resale royalties would, in reality, benefit artists generally, that fact alone, regardless of any infirmity in the supporting arguments, might be reason enough to consider their establishment. As I said at the outset, however, I have come to believe exactly the opposite: that resale royalties would be neither of any benefit nor even neutral in their impact but would in fact do enormous harm to the already not-very-well-being of contemporary artists.

Unpalatable as it may be to many, works of art—once out of an artist's hands—become commodities. They are articles of commerce. As such, the prices at which, and the numbers in which, they are bought and sold in both their initial and resale markets are influenced by those same considerations that affect the level of prices and sales of any commodity in any market.

No matter how else it may be characterized, a resale royalty would function as a tax. As a tax, it would—as we know from long experience with other taxes—impact heavily upon the behavior of those to whom it applied. If contemporary art were as much a necessity for collectors to buy as it is for artists to make, this might not matter. Unhappily, though, no matter how bravely we proclaim "ya gotta have art," nobody "gotta" have art, and especially contemporary American art.

If contemporary works of art are to be the subject of a discriminatory tax—one that would not be equally applicable to such alternative "collectibles" as 19th-century

contemporary crafts, Ming vases, shares of IBM or condominium in the Bahamas—there every reason to believe that some number collectors would choose alternative investments. Ironically, these would most likely be those very same collectors who most distress artists by considering works of art primarily for their investment possibilities rather than as a personal commitment. Without greater knowledge of the art market, we do not know what this number and their impact might be. What we do know is that to impose a greater tax on one commodity than on another that can readily be substituted for it is to alter the pattern of demand and that, in any market, a reduction in demand must inevitably be followed by a reduction in either or both the level of prices and the volume of sales.

As it is, contemporary works of art are,

security that increases in value by 20 percent can, on resale, yield its owner a profit. A work of art that increases by only the same amount will more likely yield its owner a loss. And, unlike a security, neither such loss nor any intermediate cost of ownership is generally deductible for tax purposes.

Into this already fragile situation, the resale royalty would introduce a further disincentive. Its impact—if calculated on the basis of gross proceeds rather than, as in the case of an income tax, on profit alone—would be far greater than the generally proposed figure of five percent at first suggests.

Assuming an average expense of 20 percent, a collector cannot—even before any resale royalty—resell a work of art for less than 125 percent of its original purchase price without incurring a net loss. By adding

son to other taxes. Thus, if the same painting were resold for \$14,000, the resale royalty—\$700, to be paid out of the net profit of \$1,200 remaining to the collector after expenses—would equal an income tax of 58 percent. If the painting were resold for \$20,000, the royalty of \$1,000 would—after deducting expenses of \$4,000—still equal a tax on his profit of more than 15 percent. Even with a three-times appreciation—the original \$10,000 painting resold for \$30,000—the royalty, calculated on gross proceeds, would equal a tax of more than 10 percent of the net profit remaining after the cost of sale. Beyond this, the collector would still, of course, be required to pay state and federal income taxes on whatever remained.

To make contemporary American art so disfavored an investment can only affect the



for the most part, poor investments already. While some may increase in value, the greater number can never again be resold for what they initially cost. Those that do increase in value must increase substantially before any significant return can be realized. Unlike securities, for example—which a stockbroker's commission may be less than one percent—the expense of reselling a work of art through a dealer or at auction will often be 15 to 25 percent. To this, before a profit can be realized, must be added any intermediate costs of ownership: insurance, conservation and shipping. A se-

a resale royalty of five percent of gross proceeds, the minimum breakeven point would rise to 133 percent. In the case of a painting bought for \$10,000 and resold for \$13,000, leaving a net of \$10,400 after the payment of expenses, the collector—his remaining profit having been already wiped out—would have to pay a substantial portion of the \$650 resale royalty directly from his own pocket.

As resale prices began to exceed 133 percent of the original purchase price, the impact of the royalty, while no longer confiscatory, would still remain high in compari-

An auction at Sotheby Park & Bonnet. On stage, *Indian's Love*. Against the wall, works by Don Judd and Morris Louis.

level of demand in its primary and secondary markets. While diminished demand might initially affect volume, it would sooner or later be reflected in prices as well. If the prices and sales of well-established artists were the first to weaken, then those of almost-as-well-established artists would inevitably follow. The process would continue until it affected the sales and prices of the least established of all.



*Less now, more later?* Acknowledging that the market might be thus affected, some proponents of resale royalties have argued that artists would nevertheless make up, and ultimately surpass, any initial depression in their primary selling prices by the resale royalties they would earn in later years. Surely, there are some who might: the well-established artists, those with regular resale markets and, for the most part, substantial primary markets as well.

For the greater number, though—the 90 or 99 out of every 100 whose work never increases substantially in value, who may have no resale market at all and who might far better be the focus of legislation intended to benefit artists—no subsequent royalties would make up for this initial deficiency. In the end, what the establishment of a resale royalty would do is what most regressive legislation does: the rich might—might not—get richer, but the poor would certainly get poorer. As Monroe and Aimée Price concluded in their 1968 *Yale Law Journal* article analyzing the distribution of benefits under the comparable *droit de suite* legislation in France: “to those who have shall more be given.”

When gross sales proceeds are used as the basis for computing royalties, this balance is tilted still further—to those who have the most shall the most be given. Artist A, young and unknown, sells a painting for \$1,500. Several years later, primarily as a result of A's steadily growing accomplishments and reputation, the painting is resold for \$15,000, a tenfold increase. At five percent, Artist A will receive a royalty of \$750 to add to the \$1,500 he received on the original sale. Artist B, mature and well established, also sells a painting. The price is \$18,000. After the same several years, it too is resold. The price is \$20,000, a moderate increase reasonably attributable to the intervening inflation. Artist B will receive a royalty of \$1,000 to add to the \$18,000 that he received on his original sale.

Results such as these are inherent in the gross proceeds formula. They make an awkward fit with the argument that justifies the establishment of resale royalties as rectifying an injustice done to artists when collectors sell their work at very large profits. In fact, the artists who already have the strongest primary markets, and generally the strongest secondary markets as well, would be those likely to benefit the most from this formula. For them, only a moderate percentage increase on resale would be necessary to trigger a substantial royalty. For newly established artists, a many-fold increase might not bring them nearly as much.

*Alternatives.* The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work—not such abuses as may occur in the resale market. What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase these funds but, at best,

would merely redistribute—ostensibly from collectors to artists but, as a side effect, also from the less-established to the better-established artists—some portion of the inadequate funds already in the market. At worst, by imposing a discriminatory tax on contemporary art, it would reduce such funds.

In Europe, where it originated, the resale royalty has not produced any substantial returns for the great mass of artists. In some countries it has been rejected, in others it is unenforced and, at its best, it favors only a few. In California, the resale royalty established last year has thus far served only as a divisive element within the art community and has produced virtually no tangible benefits for artists.

Given the limited, and possibly transient, attention that Congress can focus on this problem, it would be far bolder and more productive if artists and those who would help them channeled their energies behind legislation that would have an effect exactly opposite to that to be expected from royalties—that would increase, rather than diminish, the potential funds available for the purchase of contemporary art.

Most effective would be legislation that, instead of making art a less favored form of investment, would do just the contrary and give it a special and favored status. That is a route that other special-interest groups have taken with advantage. There might, for example, be a provision parallel to the present Section 1034 of the Internal Revenue Code which defers to a later time any capital gains tax otherwise payable on the sale of a taxpayer's residence provided that the proceeds realized are used to purchase a new residence. By giving collectors an incentive to use the entire proceeds from the resale of a work of art—both their initial investment and any profit realized—to purchase additional works of art, substantial additional monies could be brought into and kept in the market for contemporary art.

Such a provision could include many refinements. It might limit qualifying new purchases to the work of living American artists. It might require that all such purchases be made directly from artists and not in the secondary market. To benefit a broader group of artists, it might require that no single purchase could exceed some particular price or some particular portion of the amount to be reinvested. Whatever the formula, the object would be to provide an incentive for recycling back into the market—and thus back to artists—100 percent of the funds invested in every kind of art, ancient and modern, domestic and foreign—and not merely five percent of the resale proceeds from contemporary art.

Another alternative that has been suggested is the establishment of an art bank similar to that which now exists in Canada. Should an art bank be considered desirable, there is no reason why it need be, as some have suggested, connected with—or financed through—resale royalties. While no one has yet estimated what level of funding

would be necessary to establish, supervise and enforce a nationwide resale royalty, it must be considerable. Instead of using these funds to provide more jobs in Washington, why could the same funds not be used as the initial capital for an art bank? Its benefits could flow to artists immediately—not in five or ten years hence, as would be the case if resale royalties were to be used for its financing. Moreover, such funds would be “new money” in the market—not, as would be the case if an art bank were financed through royalties, simply a redistribution of the funds already there.

“Percent for art” legislation has only recently begun to receive the stronger backing that it deserves. Where it does not yet exist, it can be brought into being. Where it already exists, there may be the possibility of seeking higher percentages. At the federal level, Representative Gladys Spellman of Maryland has taken this course with the introduction this past summer of H.R. 7988, which would require the General Services Administration to double to one percent the percentage of construction funds to be used to commission or purchase works of art.

One enormous advantage of “percent for art” legislation is that it can coexist at the federal, state, county and municipal levels. In some local jurisdictions, substantial percentages have been achieved. San Francisco has established a two percent rate, Miami Beach has a one and one-half percent rate, and a one percent rate will become effective in Colorado this coming July. Above all, legislation of this kind at the local level offers the broadest group of artists not only the possibility of improving their livelihood through the sale of their work but, beyond that, the opportunity to see their work woven into the public fabric of the communities in which they live.

Whether these or other devices, alone or in combination, represent the best possible approach, what they share is the purpose of increasing the demand for contemporary works of art by injecting into the market new funds that could be channeled toward their purchase. Rather than serving to divide, such measures could enlist the enthusiastic support of all elements within the art community and, in the most practical way, offer what artists presumably want most from any legislation passed on their behalf: an increased opportunity to earn dignified livelihoods through their own creative efforts.

In the end, we would all be the beneficiaries. ■

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*This article is adapted from a statement submitted by the author at the request of the office of Rep. Henry Waxman of California, who is planning to introduce into Congress a bill that would establish a national system of resale royalties. The views expressed are entirely those of the author and in no way represent the views of the Smithsonian Institution or the Hirshhorn Museum and Sculpture Garden.*

# SOTHEBY'S

FOUNDED 1744

**Statement of Michael L. Ainslie  
President and Chief Executive Officer of Sotheby's Holdings, Inc.  
before the Senate Judiciary Subcommittee  
on Patents, Copyrights and Trademarks  
Hearings on S.1619  
December 3, 1987**

Mr. Chairman, my name is Michael Ainslie, and I am President and Chief Executive Officer of Sotheby's Holdings, Inc. Sotheby's is the world's largest auctioneer of works of art. Our sales for the 12 months ended August 31, 1987 were \$1.3 billion and consisted of over 200,000 separate sales of works of art.

We accept works of art on consignment, promote their sale to the world market and earn a commission based on the hammer price at auction. Our principal sales rooms are in New York and London, and we have other auction centers and representative offices in twenty-five countries around the world.

Over the last decade, the U.S. has caught up with London as one of the two preeminent centers of the world art market. While New York City is the center of the art business in this country,

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# SOTHEBY'S

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there are thriving auction houses and dealers in many of our major cities, including Washington.

We estimate that sales of important works of art by auction houses and art dealers are approximately \$2 billion annually in New York alone. Sellers and buyers come not only from this country but from around the world to participate in the free market here, and this activity in turn generates hundreds of millions of dollars of sales and income tax revenue as well as revenue for airlines, hotels and restaurants.

All of this is to put my remarks in context. There are abundant reasons why a 7% resale royalty will be harmful to the interests of artists and the art market in this country. Others are perhaps better qualified to testify as to the negative impact such a gains tax will have on collectors' willingness to invest in recently created works of art; to the fact that a resale royalty will tend to benefit established, already successful

# SOTHEBY'S

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artists and the heirs of long-deceased artists at the expense of younger artists attempting to establish themselves; to the impracticality and unenforceability of such a tax; to the fact that the tax is not really necessary, since as artists mature and become successful, resales by subsequent owners of the artists' earlier art -- particularly public sales at auction -- establish higher prices for artists' unsold inventory and future original works sold by the artist; and to the lack of fairness and reciprocity in a royalty which artists do not have to pay to collectors whose purchases diminish in value.

The point that I as the head of the leading auction house particularly wish to emphasize is that art is portable and the art market is global in scope and intensely competitive. Time and again, we have seen prospective sellers select a sale location based on tax or commission differences of 7% or 8% or less. I can tell you unequivocally that collectors who have a



choice of selling in a jurisdiction without a resale royalty will elect to do so, other things being equal.

Droit de suite legislation was first passed by France in 1920 and has since been enacted by Algeria, Brazil, Chile, Luxembourg, Norway, Portugal, Tunisia, Turkey, Belgium, Czechoslovakia, Poland, Uruguay, Italy, West Germany and Morocco. None of these countries is today known for its thriving contemporary art market.

A special committee of the House of Commons in England chaired by Justice Whitford in 1977 undertook a review of copyright laws around the world, including droit de suite legislation in order to make a recommendation as to whether a provision similar to the one in S.1619 should be adopted. I would like to read you its conclusion regarding droit de suite:

"Having considered all the [relevant] matters . . . we find ourselves unable to recommend the introduction of droit

de suite in this country. Our view is that it is not necessarily fair or logical and that the main lesson to be drawn from the experience abroad is that droit de suite is just not practical either from the point of view of administration or as a source of income to individual artists and their heirs."

My colleagues in Europe also report that the practical experience of West Germany with their droit de suite law is that the cost and administrative burdens of collection greatly exceed the revenue collected. The administrative burden on collectors, museums, dealers and auction houses will be substantial as well. We also understand that the relevant authorities in Italy, Germany and Belgium are recommending the abolition of droit de suite legislation in those countries.

We know from California's experience with a 5% resale royalty introduced a decade ago that compliance is virtually nonexistent. The agency in charge of collecting royalty payments

# SOTHEBY'S

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when sellers are unable to locate artists has stated that it has collected only about \$15,000 since the royalty went into effect.

Our views do , of course, reflect our commercial self-interest as market-makers. No business welcomes the notion of an additional tax, let alone a unique gains tax applicable solely to that business, and a tax which does not exist in principal competing jurisdictions.

Quite apart from our commercial concern, however, we believe that as well-intentioned as the resale royalty may be, it simply will not achieve its stated purpose of helping and rewarding artists. The compelling empirical evidence of other jurisdictions' experience tells us that the royalty is uncollectable, drives business underground or abroad, and invites non-compliance or fraud. Common sense and economic analysis tell us that a resale royalty will depress the market for works of art. As a firm which depends on the continuing creation of

# SOTHEBY'S

FOUNDED 1711

contemporary art to provide paintings, prints and sculpture for a major area of our business, we strongly favor measures that will stimulate artistic production. Our sales of contemporary art in the U.S. have grown from \$2,900,000 in 1980 to \$52,000,000 this year. Accordingly, we will always support a national policy that encourages the creation of art and benefits visual artists.

The problem with the resale royalty is that it produces exactly the opposite effect by depressing the market for art. To quote from a leading authority on droit de suite legislation, "The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work . . . What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase the funds [but] by imposing a discriminatory tax on contemporary art, it would reduce such funds." [Stephen E. Weil, "Resale Royalties:

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Nobody Benefits", 1978] There are already ample costs and taxes built into collecting art. For a seller in New York City, the proposed 7% gains tax would be in addition to the dealer's or auction house's commission and expenses, the costs of having insured (and perhaps having conserved) the art, and state and local income tax on the gain in value.

There exist other legislative possibilities that will better serve the valid purposes of S.1619. These include permitting artists who donate works of art to qualified charities to take a fair market value income tax deduction, and permitting collectors to roll over the gain on a sale of art if they use the proceeds to purchase additional art, much as we are now permitted to do when we sell our principal residence. Such provision might well encourage collectors to explore new and untested artists, thereby having precisely the effect that proponents of S.1619 advocate.

I would like to close by quoting from a statement made by

# SOTHEBY'S

FOUNDED 1744

Representative Henry Waxman in 1978, when he introduced a 5% resale royalty bill: "The benefits to be gained by visual artists by Congressional recognition and enactment of royalties for them may be outweighed by the harm done the art market by virtue of their implementation."

It is simple logic that what harms the art market is not helpful to artists. Representative Waxman's concern is shared by all of us in the market, and I would urge all of you to give serious consideration to both the adverse and counterproductive consequences of a national resale royalty and to legislative alternatives which will benefit the entire art community -- artists, collectors, dealers and auctioneers.

Mr. Chairman, I understand that the record will be held open for another two weeks, and I therefore request that we be permitted to submit within that period supporting documents and correspondence from interested parties.

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**VIA HAND DELIVERY**

William Patry, Esq.  
Policy Planning Advisor to the  
Register of Copyrights  
U.S. Copyright Office  
Library of Congress  
Washington, D.C. 20559


Re: Docket No. RM 91-1  
Study on Resale Royalties  
for Works of Art

Dear Mr. Patry:

Transmitted herewith, on behalf of the Committee for America's Copyright Community ("CACC"), are an original and ten copies of CACC's Reply Comments in response to the Copyright Office's Request for Information in the above-referenced docket.

Should you have any questions, please contact me.

Very truly yours,

  
John B. Glicksman

JBG/kkj

Comment Letter

RM 91-1

No. 5

Before the  
United States Copyright Office  
LIBRARY OF CONGRESS

Request for Information;	)	
Study on Resale Royalties for	)	Docket No. RM 91-1
Works of Art	)	

**REPLY COMMENTS OF**  
**THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY**

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Its Attorneys

DATED: August 1, 1991



Before the  
United States Copyright Office  
Library of Congress

Request for Information;	)	
Study on Resale Royalties for	)	Docket No. RM 91-1
Works of Art	)	

**REPLY COMMENTS OF  
THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY**

The Committee for America's Copyright Community ("CACC")<sup>1/</sup> respectfully submits the following reply comments concerning the Copyright Office's "Request for Information" published at 56 Fed. Reg. 4410 (February 1, 1991), concerning the feasibility of federal resale royalty legislation.

CACC is composed of representatives of a variety of America's copyright creators and users. Its members include the creators and producers of newspapers, books, magazines, newsletters, computer software and databases, information services, motion pictures and other video and film products, educational testing and training materials, information services, sound recordings, and commercial broadcasters.

CACC submits these comments in light of its on-going concern with legislative efforts that could threaten the constitutional goals of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright-intensive industries in the U.S.

At the outset, CACC stresses that those who propose to amend federal law to incorporate resale royalty rights bear a heavy burden. The concept of resale royalty rights, or droit de suite, is generally foreign to the United States; laws that grant such rights have developed overseas, in nations with economic, political and legal systems that are significantly different from our own. Thus, CACC believes not only that the proponents of such rights must demonstrate the necessity for such rights and the ability of such rights to fit within the existing U.S. framework; in addition, they must prove that such rights will not affect our highly successful copyright system.

As the Copyright Office notes at the outset of its Request for Information, it is undertaking its study on the feasibility of resale royalty legislation pursuant to the

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<sup>1/</sup> See Attachment A hereto for a list of the members of CACC.

provisions of the Visual Artists Rights Act of 1990 ("VARA").<sup>2/</sup> Taking VARA as a reference point, certain commenters have suggested that resale royalty legislation should cover all "works of visual art," as defined in VARA,<sup>3/</sup> and broad categories of additional works as well.<sup>4/</sup> These commenters would have resale royalty legislation cover, for example, all photographic images and illustrated manuscripts.<sup>5/</sup>

In these comments, CACC focuses solely on this issue of the categories of works that might be covered under any federal resale royalty legislation. Despite the limited focus of these comments, however, it should be clear that CACC does not in any way advocate the enactment of resale royalty rights, and that CACC and/or its individual members may have concerns, reaching well beyond those that are addressed here, with any

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<sup>2/</sup> Act of Dec. 1, 1990, Pub. L. 101-650, 104 Stat. 5089, Sec. 601 (short title); see Request for Information at 4410.

<sup>3/</sup> A "work of visual art" is defined as:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies of fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author or in a limited edition of 200 copies of fewer that are signed and consecutively numbered by the author.

17 U.S.C.A. § 101 (West 1977 and Supp. 1991).

<sup>4/</sup> See, e.g., Comments of the American Society of Magazine Photographers at 5-7 and Comments of Volunteer Lawyers for the Arts at 7-8.

<sup>5/</sup> Id.

forthcoming specific legislative attempt to enact resale royalty requirements.

CACC respectfully submits that the above-referenced commenters have lost sight of the underlying purposes of any resale royalty legislation, and of VARA as well. CACC believes that, when these purposes are considered, it is clear that, rather than covering a category of works broader than the category covered under VARA, resale royalty legislation should cover items parallel to those encompassed by VARA, except that it should reach only the original embodiment of a work and not any copies or duplicates.

The purpose of resale royalty legislation is to attempt to compensate a qualifying artist for the increase, over time, in the value of an original embodiment of a work of art. This purpose is evident in the only resale royalty statute existing in the U.S., California's Resale Royalty Act.<sup>6/</sup> That statute requires royalty payments to an artist upon the sale of "an original painting, sculpture, or drawing or an original work of art in glass,"<sup>7/</sup> and appears to exclude duplicates of the originally executed work.<sup>8/</sup> Likewise, the purpose of VARA generally is to preserve and protect original works of visual art and limited edition copies, the loss of which deprives the public of unique creative endeavors, and to do so without adversely affecting the business activities of America's copyright industries.<sup>9/</sup>

Therefore, any federal resale royalty legislation should cover items parallel to those included within VARA's definition of "work of visual art," except that it should cover only the original embodiment of a work and not any copies or duplicates of the work. Covering originals addresses the goal of compensating an artist for the increase in the value of an original work. At the same time, covering only items parallel to those encompassed by VARA is consistent with Congress' determination that covering such items promotes the dissemination of copyrighted works without disrupting the

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<sup>6/</sup> Cal. Civ. Code § 986 (Deering 1990).

<sup>7/</sup> Cal. Civ. Code § 986(a) (Deering 1990) (emphasis added).

<sup>8/</sup> 2 M. Nimmer and D. Nimmer, Nimmer on Copyright, § 8.22[A] at 8-376 (1991).

<sup>9/</sup> See H.R. Rep. No. 514, 101st Cong., 2d Sess. at 12 (1990).


operation of America's copyright industries. Indeed, excluding copies and duplicates is necessary to avoid the confusion, administrative burdens and delay, and legal wrangling that could result from legislation that would mandate that an artist be repeatedly compensated upon each sale of each of potentially 200 copies of an original work.

By the same token, the goal of compensating artists and protecting original works of art while still promoting the dissemination of such works also dictates that resale royalty legislation incorporate certain other provisions parallel to those in VARA. Such provisions include those that (1) specifically exclude certain works from coverage,<sup>10/</sup> (2) render inapplicable the statutory rights in specified situations,<sup>11/</sup> and (3) permit waiver of the statutory rights under appropriate circumstances.<sup>12/</sup> Again, Congress carefully crafted these provisions in VARA to ensure that VARA would not adversely affect the business activities of America's successful copyright industries and the constitutional goals of promoting the production and dissemination of copyrighted works.<sup>13/</sup> This effort would be undermined if similar protections were not made a part of any resale royalty legislation.

Respectfully submitted,

THE COMMITTEE FOR AMERICA'S  
COPYRIGHT COMMUNITY

By:

  
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August 1, 1991

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<sup>10/</sup> See 17 U.S.C.A. § 101 (West 1977 and Supp. 1991) (exclusions from definition of "works of visual art").

<sup>11/</sup> See 17 U.S.C.A. § 106A(c) (West 1977 and Supp. 1991) (exceptions to applicability of rights of attribution and integrity).

<sup>12/</sup> See 17 U.S.C.A. § 106A(e).

<sup>13/</sup> See H.R. Rep. No. 514, 101st Cong. 2d Sess. at 17-18 (1990).

**Members Of The**  
**COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY**

**1991**

The American Film Marketing Association  
Association of American Publishers  
Association of Independent Television Stations, Inc.  
Association of National Advertisers  
The Dun & Bradstreet Corporation  
Harcourt Brace Jovanovich, Inc.  
Information Industry Association  
International Communications Industries Association  
Magazine Publishers of America  
McGraw-Hill, Inc.  
Meredith Corporation  
Motion Picture Association of America, Inc.  
National Association of Broadcasters  
Paramount Communications, Inc.  
The Reader's Digest Association  
Recording Industry Association of America, Inc.  
Time Warner, Inc.  
Times Mirror Co.  
Training Media Association  
Turner Broadcasting System, Inc.



# V I S U A L

Entidad de Gestión de Artistas Plásticos

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Fax. 549 28 41

Madrid, August 20th 1991

Dear Mr. Patry,

Through my colleague Monsieur Gutton I have been informed of your recent visit to Paris collecting information about the european legislation and the state of the market in relation with the "Droit de Suite" or Resale Royalty.

I will be glad to inform you of the spanish legislation on this materia as well as on the situation of the market and the coming legal reformation on this question.

As you probably know Resale Royalty is recognized in Spain as such since 1987 through the Intellectual Property Law of November 11th 1987.

The percentage that is applicated is of 2 % on the price of the resale of the work of art, with independance to the price reached beforehand, and from a minimum of aprox. \$ 2.000. For the moment the royalty cannot be transmitted to inheritors. However, soon this situation will change with the presentation of a Proyect of Law to the Parliament which increases the percentage to 3 % and extending it to being transmissible to inheritors.

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Since its creation, our society is collecting with regularity this royalty from the Auction Houses and proximately (coming November) we will sign a contract with the principle Associations of Galleries in order to collect the royalty in transactions made by them.

It would be a pleasure for me to amplify this information therefore I put myself at your entire disposal for anything you might find to be of utility for you.

Yours sincerely,



Javier Gutiérrez Vicén  
Executive Director

CE G-7944/753

cc: Mrs. Catherine Auth / Artist Equity Association Inc.  
Mr. Theodore Feder / A.R.S. Artist Rights Society  
M. Jean-Marc Gutton / A.D.A.G.P.

Comments on Copyright Office's Request for Information;  
Study on Resale Royalties for Works of Art

by National Artists Equity Association  
June 1, 1991

National Artists Equity Association is the only trade association of visual artists in the United States today and has played a major role over the last fifteen years in the area of advocacy for artists' rights. We have a special interest in the topic of resale royalties for a number of reasons. First, it was members of Artists Equity in California who successfully promoted the passage of the California Resale Royalty law in 1977. Second, we were the most active promoter of the Visual Artists Rights Act of 1990. Our views in support of Senator Edward Kennedy's first two versions, which contained resale royalty provisions, were made public at the Senate subcommittee hearing on November 18, 1986 and the House subcommittee hearing on June 9, 1988. Finally, while everyone else seems to know what is best for artists, it is critical that artists be given the opportunity to speak for themselves through their own organization.

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We believe that should resale royalties become a federal law, the mechanisms required for enforcement would be created. We would certainly want a role in the creation of such an enforcement agency. The mechanics of implementation are much simpler to address if a consensus on the intention of resale royalties can be reached. The opposition to this concept have, in the past, made the claim that the most serious reason for not implementing resale royalties is that it will actually harm artists. We appreciate this concern, but question if this is really the opposition is sincere. National Artists Equity is most concerned about clarifying the intent of resale royalties and we will focus our comments primarily on its debated effect on the creators of works of art.

Aside from a handful of artists who were organized in 1988 by art dealers, the overwhelming majority of artists in the U.S. favor the establishment of resale royalties. The largest group of these are not the most successful of artists. They are artists struggling for success and recognize that they are prone by necessity to sell their work for prices that do not actually reflect their work's potential value. Every artist has to start at this same point. They create works of art, not because they are a commodity but because they are a means of communication. Financial rewards come to many artists over a lifetime and a few become genuinely wealthy. One artist's success is not, however, the reason for another artists's failure. Artists should be successful in a healthy society. They shouldn't have to apologize just because they have chosen a

profession in which it may be more difficult to succeed than in banking or law. And like success in any field, the financial rewards encourage one to continue the pursuit of the activity. Economic rewards for creators is the very purpose of Copyright Law. Resale royalties is one more way to encourage the creation art.

The fact that resale royalties would benefit successful artists more than others is no argument against it. The intention of resale royalties has never been to establish a welfare program for less successful artists, as much as we can make serious arguments in favor of such a program. If art dealers were so concerned about less successful artists they would establish such a program out of their own profits. When a work is resold for a profit the artist deserves to share in what has resulted from their lifetime of work, reputation and success.

Who, also, can predict that once successful through primary sales an artist will always be successful. It is not uncommon for the fashion-oriented contemporary art market to ignore the new works of a particular artist in favor of the works from a particular "period" of the artist's career. We know of several established and respected artists, who have sold work in the five figure range, but don't currently have a dealer because their work is not "in style". What happens to these artists if they don't have another source of income? This is a case where a royalty from a resale would make an enormous difference.

Resale royalties would not be a tax, as some have claimed, any more than royalties to song writers and authors of other published works are a tax. They claim it would discourage sales and therefore hurt artists. To accept this idea, one has to assume that, regardless of the motivation for considering the purchase of a work of art, the decision to buy will be negatively affected. The possibility that a small percentage of the appreciated value (in a value added system) shared with the creator would cause a deterrence to the sale is highly unlikely.

The best evidence to support the non-deterrence position exists in Europe, where resale royalty systems have not killed the primary or secondary market and artist organized enforcement agencies monitor sales and collect royalties. California is another example. In spite of the fact that artists lack an enforcement agency, many artists have collected royalties and the market has not suffered. Collectors have to share 40-60% of the proceeds of a consignment sale with the art dealer, which is just what artists do when they sell the work through the dealer. This, however, hasn't caused the market to suffer.

Resale royalties would have less of an impact on the potential buyer than a sales tax, which must be paid upon purchase. Those who claim that resale royalties would discourage sales don't seem to be complaining about the effect of sales tax and dealer commissions. One opponent even went so far as to say recently that the near

elimination of income tax benefits, which collectors once enjoyed, has already harmed their motivation to buy art. Resale royalties might be the final blow needed to stop collectors from buying art altogether - making artists the principal losers. Why have we not heard that these collectors are breaking down the doors of Congress to restore their tax breaks because they are concerned about the artists who are suffering? This is just one more case of a non-artist using the "artist's interests" against the interests of artists.

# ARS

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Service photographique de la Caisse Nationale des  
Monuments Historiques et des Sites

Photothèque des Musées de la Ville de Paris

May 29, 1991

Mr. William Patry  
Policy Planning Advisor  
to the Registrar of Copyrights  
Office of the Registration of Copyright  
Copyright Office  
James Madison Building, Room 403  
Independence Avenue, S.E.  
Washington, DC 20559

Comment Letter

RM 91-1

No. 8

Dear Mr. Patry:

I am writing in response to the "Request for Information, Study in Resale  
Royalties for Works of Art."

I am the head of Artists Rights Society (ARS), an organization which represents the rights and permissions interests in the United States of a number of the major European rights societies including ADAGP and SPADEM of France. These two organizations represent the estates of virtually every artist active in France in this century, from Monet through Picasso, Chagall, Miro, and Giacometti.

ADAGP and SPADEM operate under the legislative sanction of the French government, which has a long and honored history, dating back to the French Revolution, of promulgating measures to protect the economic and moral rights of artists and authors. ARS' role on their behalf is to protect the rights and interests of these artists within the U.S.

Another principal objective of ARS is to act on behalf of American artists as well as of European ones. Our American members include among others Jackson Pollock and Lee Krasner (through the Pollock-Krasner Foundation), Milton Avery (through the Milton Avery Trust), Robert Mangold, Sol LeWitt, Mark Rothko, Georgia O'Keeffe (through the Estate of Georgia O'Keeffe), Frank Stella, Andy Warhol (through the Estate and Foundation of Andy Warhol), and Willem de Kooning (through the Conservatorship of Willem de Kooning). A partial list of our members is attached.

All the rights societies are grouped under an international organization called CISAC (Confederation International des Societes d'Auteurs et Compositeurs). CISAC's activities are directed towards the accomplishment of four principal aims:

- 1) To ensure the safeguard, respect, and protection of the moral and professional interests stemming from any literary or artistic production.
- 2) To Watch over and contribute to respect for the economic and legal interests attaching to the said productions, both at the international level and that of national legislation.
- 3) To coordinate technical activities between Societies of authors, artists, and composers and ensure their collaboration in this field, subject to the

understanding that each Society remains master of its own internal organization.

4) To constitute an international center of study and information.

I will submit answers to the questions raised in the "Request for Information" in the numbered sequence in which they appear in the Federal Registry.

1. The resale royalty would not in the opinion of ARS discourage the creation of new works of art. If anything, it would encourage them. In so far as artists are ever motivated by financial return, it is bound to heighten such motivation, since in the event of secondary sales it would ensure a return to the artist, his family, or heirs.

The movement to grant resale rights to artists originated in France prior to World War I. It was set in motion by a general concern for the welfare of the artist and his heirs, stimulated in part by a widely published cartoon of Jean-Louis Forain showing two children dressed in tatters outside the doors of a posh auction salesroom. "Look," one of the ragamuffins says to the other, "they're selling one of daddy's pictures."

The resale right, better known as the *Droit de Suite*, was codified in France in 1920, and has passed into law in 28 countries. Some claim that the right would drive down the first or subsequent sale price of original works of art, causing hardship to the creators. However, in no country with the resale right has this been known to happen, and informed American artists seem not unwilling to run this risk.

2. The law should cover creations which may be described as either works of painting or sculpture, in the somewhat broadened definition of these terms as consensually accepted in the art world. These enlarged categories are sometimes subsumed within the term "graphic or plastic works."

It would not be a bad idea for a threshold value to be triggered before a work of art could qualify for the *Droit de Suite*. However, to meaningfully benefit the maximum number of artists, this figure should not be too high or too low. A threshold of \$500.00 plus or minus \$250.00 is probably adequate. Below, the royalty which would accrue to the creator would be very small indeed. If set too high, the number of beneficiaries would be unduly diminished.

It should not be necessary to base the royalty on a percentage of profits from the current sale as compared to the price received from the previous one. It is often very difficult, if not impossible, to trace the sale records of works of art.

Rather than seven percent of profits, as once suggested, ARS would readily accept a lower rate of four or even three percent, provided the royalty were applied across the board as a flat percentage of the sale price, without reference to previous sales. This is the practice in France, Belgium, and Germany, where the law is easily administered without the need of bureaucratic intervention. On the other hand, the experience of Italy, Portugal, Uruguay, Czechoslovakia (and California) of computing the royalty on the increase in value over the preceding sale, has not been successful.



Returning to the percentage of the resale royalty, the present French law promulgated in 1957, fixes the rate at 3%. The German law, which applies to both galleries and auction houses, mandates 5%. In our estimation, one of the drawbacks of the well-meaning Kennedy proposals of 1987 is that it suggested a rate which was unusually high, namely 7%, and provoked undue opposition. Although we are none too certain that the hard core opponents of the resale royalty would be more amenable to a reduced figure, it is our view that 3% to 4% would be adequate.

3. and 4. The term of eligibility for the resale royalty should be the life of the artist plus fifty years. This is also the applicable term in France and Germany. It should be descendable.

It is not coextensive with the copyright in the work, except by coincidence, nor should it be dependent on the copyright. In France the copyright term is life plus 64 years, 203 days (calculated from the 1st of January immediately following the artist's death), and in Germany, life plus 70 years. While it is very rare for a European artist to alienate his or her copyright, it can be done; by contrast, the *Droit de Suite* is considered to be and should remain inalienable.

The right should not be limited to works created in the United States, and should clearly include works of foreign origin sold in the United States. Article 14ter of the Berne Convention calls for an author or artist to "enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work," providing the member country has passed resale royalty legislation. Berne member states which have adopted the *Droit de Suite* automatically bestow reciprocal rights on other member states possessing the right. Were the U.S. to exclude foreign works, U.S. works in turn would be excluded from resale benefits in foreign member states.

Another aspect of this same issue concerns the so-called question of retroactivity. As presently employed, the term often serves to deprive foreign artists of their rights. For example, U.S. adhesion to Berne (which took effect on March 1, 1989) is said to apply to existing works of art which have previously fulfilled the formal requirements of the U.S. copyright law (notice and registration), or to new works created after the date of adhesion. Previous U.S. copyright law had often served to deprive European artists of copyright protection on the principle that their works were not formally registered or copyrighted in the U.S. Such works are said to have passed into the Public Domain in the U.S.

This principle ignores the fact that most European works were automatically copyrighted at the moment of creation, under Berne and the national legislation in the country of origin, and consequently required no formalities for protection.

A failure to apply Berne to existing European works contradicts Article 28 of the Convention: "This Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin through expiry of the term of protection."



The Berne provision also runs counter to Article VII of the Universal Copyright Convention, to which the U.S. has been a long time adherent. That provision states, "This Convention shall not apply to works... which are permanently in the public domain in the said contracting state."

In conflicts between the U.C.C. and Berne, the so-called "Berne Safeguard Clause" of the U.C.C. provides that Berne, and not the U.C.C., prevails in relationships between Berne members. (Viz. Article XVII, and the Appendix Declaration, Item b of the U.C.C.)

"This convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that convention."  
(U.C.C., Article XVII [1])

"The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of Berne Convention, a country of the International Union created by the said convention."  
(U.C.C., Appendix Declaration relating to Article XVII [b])

Thus to apply a resale royalty under the theorem of prospectivity only would serve to strip the right from all existing U.S. and foreign works, even though the latter enjoy the right in nations having the *Droit de Suite*. The terms retroactivity and prospectivity should be employed in their proper context here, (as understood by our Berne partners), namely that the date of the secondary sale, and not the date of the work's creation, be the determining factor. Consequently there would be no retroactive application of the resale royalty in the sense that it could never apply to auction sales which took place prior to the effective date of the law. It would apply prospectively, that is to all auction sales of eligible works which occur after the effective date of the law. Eligibility, therefore, would be determined under the existing rule of life plus 50 years, and within the reciprocal norms of the Berne Convention.

5. A system similar to that which operates in France would seem to be the simplest and most direct form of administering the right. There it functions in the following manner.

A few days prior to a given auction, the auction house receives a list from the rights society (ADAGP or SPADEN) informing it of the titles of the works and the names of the artists for which the *Droit de Suite* is to be collected. Such lists are formulated by the rights societies from the sales catalogues it receives in advance of the auctions. After the sale has been completed, the auctioneer fills out and returns the list with information on the sales price and the amount due for the *Droit de Suite*. This is accompanied by a payment which the society distributes to the artists involved.

The landmark French artists rights law of 1957, which fixed the current rate at 3%, extended the resale royalty right to galleries. However, the law has never actively been applied to galleries, though there is some current effort in

France to do so. By contrast, galleries as well as auction houses are effectively covered under the German law.

As the right is designed to apply to sales of a work of art, there is no basis of application in cases where the object is presented as a gift or exchange, and we would not attempt to assign a value in such cases. Therefore, no royalty would be collected in these instances.

As we strongly recommend against basing the right on the profit differential between the present and previous sale, there would be no need to maintain a costly and time-consuming registry of sales prices.

The right is commonly administered by the national artists rights societies and ARS is prepared to perform this function for its very many European adherents as well as its American ones. We would in fact be willing to do so for all potential beneficiaries.

6. The right should not be waivable or alienable, lest a collector, gallery, or museum demand such a waiver as a condition of its offer to acquire a work.

7. The California law should definitely be preempted in the event of a federal law. The California Resale Royalty Act (Cal. Civ. Code SS.986; 1977, amended in 1983) has failed on two main grounds: 1) It has proved impossible to determine the previous sales price of a work, which is needed to calculate the sum due the artist, namely 5% of the profit realized by the sale. 2) There is no central registry which would disclose whether an artist is a resident of California, a requirement under the law. Finally, it is very difficult to enforce the law when it applies to one state only.

Please feel free to be in contact with our society about this important issue. In the interim, kindly accept my very best wishes.

Sincerely,



Dr. Theodore H. Feder  
President

encl.

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Photothèque des Musées de la Ville de Paris

THE FOLLOWING IS A LIST OF THE MORE PROMINENT ARTISTS REPRESENTED BY ARS; PLEASE  
NOTE THAT THERE ARE MANY OTHERS. FOR MORE INFORMATION CALL (212)420-9160.

AGAM, Yaacov  
ALECHINSKY, Pierre  
ARMAN  
ARP, Hans  
ARROYO, Eduardo-Jean  
ARTSCHWAGER, Richard  
ATGET, Eugene  
AUBERJONIS, Rene  
AVERY, Milton  
BAKST, Leon  
BALET, Jan  
BALTHUS  
BAUCHANT, Andre  
BAZAINE, Jean  
BECAT, Paule-Emile  
BELLMER, Hans  
BEOTHY, Etienne  
BERARD, Christian  
BERAUD, Jean  
BERNARD, Emile  
BESNARD, Albert  
BIGOT, Georges  
BISSIER, Julius  
BLANCHE, Jacques-Emile  
BLELL, Diane  
BOMBOIS, Camille  
BONNARD, Pierre  
BONNAT, Leon  
BRANCUSI, Constantin  
BRAQUE, Georges  
BRASILIER, Andre  
BRAUNER, Victor  
BRAYER, Yves  
BUFFET, Bernard  
CAISSE NATIONALE (CNMHS)  
CALDER, Alexander  
CAMOIN, Charles  
CAPIELLO, Leonetto  
CARRINGTON, Leonora  
CASSATT, Mary  
CESAR  
CHAGALL, Marc  
CHERET, Jules  
CLAUDEL, Camille  
COCTEAU, Jean

DALI, Salvador  
DAPHNIS, Nassos  
DE KOONING, Willem  
DE STAEL, Nicholas  
DELAUNAY, Robert  
DELAUNAY, Sonia  
DENIS, Maurice  
DERAIN, Andre  
DIBBETS, Jan  
DUBUFFET, Jean  
DUCHAMP, Marcel  
DUCHAMP, Suzanne  
DUFOUR, Bernard  
DUFRESNE, Charles  
DUFY, Raoul  
DUMOYER DE SEGONZAC  
ENSOR, James  
ERNST, Max  
FAUTRIER, Jean  
FLAVIN, Dan  
FORAIN, Jean-Louis  
FORISSIER, Roger  
FOUJITA  
FRANCIS, Sam  
FREISZ, Otto  
GIACOMETTI, Alberto  
GIACOMETTI, Diego  
GIACOMETTI, Giovanni  
GLEIZES, Albert  
GONTCHAROVA, Natalia  
GONZALEZ, Julio  
GRIS, Juan  
GROMAIRE, Marcel  
GROOMS, Red  
GUILLAUMIN, Armand  
HARTUNG, Hans  
HAYDEN, Henry  
HELION, Jean  
HELLEU, Paul  
HERBIN, Auguste  
HUEBLER, Douglas  
HUNT, Bryan  
ICART, Louis  
ITTEN, Johannes  
JAWLENSKY, Alexj von

JAWLENSKY, Andreas  
 KANDINSKY, Wassily  
 KISLING, Moise  
 KLEE, Paul  
 KLEIN, Yves  
 KOKOSCHKA, Oskar  
 KOSUTH, Joseph  
 KRASNER, Lee  
 KUPKA, Franz  
 L'HOTE, Andre  
 LA FRESNAYE, Roger Andre de  
 LABISSE, Felix  
 LALIQUE, Rene  
 LAM, Wilfredo  
 LARIONOV, Mikhail  
 LAURENCIN, Marie  
 LAURENS, Henri  
 LE CORBUSIER  
 LECKWYCK, Edith van  
 LEGER, Fernand  
 LEMPICKA, Tamara de  
 LEWITT, Sol  
 LUCE, Maximilien  
 LURCAT  
 MAGNELLI, Alberto  
 MAGRITTE, Rene  
 MAILLOL, Aristide  
 MALLET-STEVENS, Robert  
 MAN RAY  
 MANGOLD, Robert  
 MANGUIN, Henri  
 MARCOUSSIS  
 MARQUET, Albert  
 MASSON, Andre  
 MATISSE, Henri  
 MATTA ECHAURREN, Roberto  
 METZINGER, Jean  
 MICHAUX, Henri  
 MIRO, Joan  
 MOILLIET, Louis  
 MONET, Claude  
 MUCHA, Alphonse  
 MUELLER, Otto  
 NADAR, Paul  
 NAUMAN, Bruce  
 OZENFAT, Amedee  
 PASCIN, Jules  
 PERRET, Auguste  
 PERRIAND, Charlotte  
 PICABIA, Francis  
 PICASSO, Pablo  
 POLIAKOFF, Serge  
 POLLOCK, Jackson  
 RAFAELLI, Jean-Francois  
 RAYSSE, Martial  
 RICHIER, Germaine

RICHTER, Hans  
 RIEMERSCHMID, Richard  
 RIGOT, Gerard  
 RIOPELLE, Jean-Paul  
 ROCKBURNE, Dorothea  
 RODIN, Auguste  
 ROHNER, Georges  
 ROTHKO, Mark  
 ROUAULT, Georges  
 SAINT PHALLE, Niki de  
 SAURA, Antonio  
 SCHMIDT-ROTTLUFF, Karl  
 SCHUFFENECKER, Claude-Emil  
 SCHWITTERS, Kurt  
 SEGOVIA, Andre  
 SERRA, Richard  
 SERUSIER, Paul  
 SERVAES, Albert  
 SEUPHOR, Michel  
 SEVERINI, Gino  
 SIGNAC, Paul  
 SIMMONDS, Charles  
 SOTO-RODRIGUEZ, Jose  
 SOULAGES, Pierre  
 SOUTINE, Chaim-Ichte  
 STEINLIN, Theophile Alexandre  
 STELLA, Frank  
 STOECKLIN, Niklaus  
 SUTHERLAND, Graham  
 TAEUBER-ARP, Sophie  
 TALCOAT, Pierre  
 TANGUY, Yves  
 TANNING, Dorothea  
 TAPIES, Antoni  
 THERRIEN, Robert  
 TOBEY, Mark  
 TOBIASSE  
 UTRILLO, Maurice  
 VALADON, Suzanne  
 VALAT, Louis  
 VAN DONGEN, Kees  
 VAN VELDE, Bram  
 VASARELY, Victor  
 VILLON, Jacques  
 VLAMINCK, Maurice de  
 VUILLARD, Edouard  
 WACHTER, Emil  
 WALDMAN, Paul  
 WARHOL, Andy  
 WEINER, Lawrence  
 WOLS  
 XENAKIS, Constantin  
 ZADKINE, Ossip  
 ZULOAGA, Ignacio

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May 31, 1991

**FEDERAL EXPRESS**

Office of the Register of Copyrights  
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James Madison Building  
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Washington, D. C. 20559

Comment Letter

RM 91-1

No. 9

Re: Docket No. RM 91-1, Study On Resale  
Royalties For Works Of Art

Sirs:

The New York Patent, Trademark and Copyright Law Association is pleased to submit its comments in response to the questions posed in the Notice Of Inquiry published in the Federal Register for February 1, 1991.

Our Association is, in general, opposed to any legislation embodying the resale royalty concept. The following comments are in response to the questions posed and are not to be considered as an approval of the concept.

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?
- A. Presumably the resale royalty legislation would promote creation of new works of art since the artist's reward is increased. It may, however, have no affect because important works of art are created in large part to satisfy the artist's urge to create. In either event, the marketplace would be affected due to the increase in complexity of art sales, and the possible diminishment of initial value of the art due to the obligation to pay the artist upon a future resale of the work.



THE NEW YORK PATENT, TRADEMARK  
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Office of the Register of Copyrights  
May 31, 1991  
Page 2

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2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?
  - A. Although resale royalty legislation is not favored, if there is such legislation, it should be applied to all works. The threshold value of one thousand dollars (\$1000.00) in the California statute appears reasonable. The resale royalty provisions should not apply unless the work of art increases in value by a certain amount, such as 25%. A 5% royalty as in the California statute seems reasonable. For simplicity, any resale royalty should be based on the gross sales price differential with no adjustment for inflation.
3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?
  - A. Artists who are citizens, or at least resident in the U.S., and who have created the work in the U.S. should benefit from any such legislation. If this provision were included in an international convention, it could be expanded or changed as appropriate. No unusual implications/complications are foreseen.

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May 31, 1991  
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4. What should the terms of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?
  - A. The term should be coextensive with copyright and the right should be descendible. The right should not apply retroactively.
5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?
  - A. One approach is to have the reseller notify the artist when a work has been resold along with an accounting. If notice is not given, any statute of limitations respecting actions to be taken by the artist should not start to run until the artist has actual notice of the resale. Another approach may be to have sales recorded in the Copyright Office, with attendant constructive notice. The resale royalty concept should not be applied to gifts or charitable contributions, but it should apply to a bartered transaction having a value greater than \$1000.00.
6. Should the right be waivable or alienable?
  - A. The right should be both waivable and alienable.
7. Should the California law be preempted in the event of a federal law?
  - A. State law should be preempted.

The NYPTCLA is the nation's largest regional intellectual property law group with over 1,000 members. We have long taken an active role in the



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Office of the Register of Copyrights  
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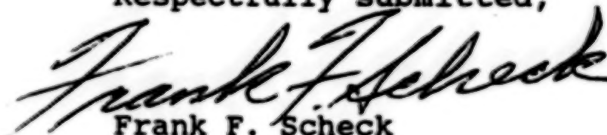
Dale L. Carlson  
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Evelyn M. Sommer  
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David J. Mugford  
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and the  
Above

drafting of legislation and treaties within our fields of expertise. Over the past several years, our representatives have been active participants in meetings of the World Intellectual Property Organization's meetings on patent and trademark law harmonization, and other intellectual property law topics.

Our Association stands ready to assist you in connection with intellectual property law matters and would appreciate the opportunity to meet with a member of your staff regarding the resale royalty matter.

Respectfully submitted,

  
Frank F. Scheck

c: Officers and Directors  
Roger Smith, Esq.

# S P A D E M

SOCIÉTÉ DES AUTEURS DES ARTS VISUELS

N/Ref. PA/CD

Office of the Registration of  
Copyright - Copyright Office  
Attn. Mr William Patry  
Policy Planning Advisor of the  
Registrar of Copyright  
James Madison Building, Room 403  
Independence Avenue, S.E.  
Washington DC 20559, U.S.A.

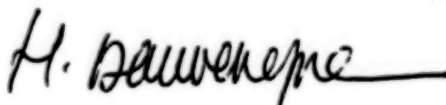
Paris, May 28, 1991

Dear Mr Patry,

We are very pleased to send you this statement to the Congress of  
the United States in support of the droit de suite.

If you need more informations, we are of course entirely at your  
disposal.

Yours sincerely,



Martine DAUVERGNE

Directeur Gérant



Pascal AUBOIN

Responsible for Legal  
and International Affairs

P.J.

Comment Letter	
RM	91-1
No.	10

Siège social : 15, rue Saint-Nicolas — 75012 PARIS

Tél. : (1) 43.42.58.58 — Fax : 43.44.84.54

43

Société civile à capital variable créée en application de la loi du 3 juillet 1985

R.C.S. PARIS D 338 420 581

R.I.B. : code banque 30004 - code guichet 00822 - N° de compte 00021802068 - clé RIB 66 - domiciliation BNP PARIS TRINITE

## **DROIT DE SUITE IN FRANCE**

### **[Translation of SPADEM Comment Letter No. 10]**

Droit de suite has been introduced in France in 1920 (law of May 20, 1920, modified by a law of October 27, 1922 and related décrets and arrêtés) and restated in the author's right law of March 17, 1957.

It can be defined as the right for the author and after his death for his heirs (then for a 50 years term) to participate in the proceeds of the auction or dealer sale of a work of art.

The goal of droit de suite is to make up for an unfair situation: often an artist sells his work at a low price. Getting to be known, the same work can be resold at a much higher price, but only the owner of the tangible embodiments of the work gains from the increase of value.

It seemed just fair that the artist should have a share, although modest, of this appreciation.

#### **I. Nature of droit de suite**

It is an economic right. But different from representation and reproduction rights in the extent that the artist has no right to control the subsequent sales of his works; yet it comprises an exclusive right giving birth to royalties on each sale.

As an economic right enabling the artist to participate in the resale's proceeds of his work, it exists from the day of the

creation of the work in the artist's patrimony and consequently must be descendible.

Droit de suite can't be assignable. the artist can't sell it nor give it up.

## **II. Field covered**

### **1. Works.**

Droit de suite applies to graphic and plastic works. Whenever a work is to be made in more than one copy (sculptures, engravings, tapestries, photos), it is agreed upon between artists' representatives and auctioneers' societies that droit de suite shall apply to a small number of copies said to be created by the artist himself.

### **2. Sales.**

The 1957 law (Art 42) states that droit de suite arises from auction sales and sales made by dealers.

### **3. Beneficiaries.**

- a) The author: during his life the author alone is entitled to droit de suite.
- b) Heirs and surviving spouse: droit de suite is descendible in accordance with the Civil Code, if estate is accepted.  
  
The surviving spouse against whom there exists no final judgment of separation or divorce is entitled to usufruct under droit de suite.
- c) Foreign authors: foreign artists can benefit from droit de suite when one of their works is sold in

France only on a reciprocity basis - (Art 7 of the Berne Convention).

But a decree of September 17, 1956, allows foreign artists who lived in France for more than 5 years and then took part in the French artistic life to claim droit de suite royalties.

4. Duration.

Life of the artist plus 50 years.

III. Mode of enforcement.

1. Basis of assessment.

The basis for droit de suite is the gross amount of the sale's price for each subsequent sale. If several items are sold at the same time, the total price must be distributed among the works.

2. Rate.

Art. 42 has settled for a 3% rate applied whenever the price is over 100 frs. (\$20).

3. Collection.

Seller must pay the royalty:

- either to an author's society which will give it back to the author minus management costs;
- or to the author himself or heirs, they must demand royalty payment not later than 3 days after the sale has occurred.

Actually the following two author's societies are collecting the royalties:

- SPADEM (visual artists' society)  
75 rue Saint Nicholas 75012 PARIS  
Tel. 43 42 5858
- ADAGP (graphic and plastic artists' society)  
11 rue Berryer 75008 PARIS  
Tel. 45 61 0387

#### IV. Artists' point of view on droit de suite.

French artists are unanimously in favor of droit de suite. It does not serve as an impediment to either their artistic career or the art market.

Along with a fair remuneration, droit de suite makes it possible for the artists to know which of their works are in circulation and at what price.



## **Translation of Appended Documents to SPADEM Comments**

The appended documents specify the scope of droit de suite in the case of works that are created in more than one copy.

### **1. Sculptures.**

Art. 79 - 30 de l' annexe III du code général des impôts (code of fiscal provisions) specify what an authentic (original) work of art in the field of bronze cast sculpture is in regard with sale's tax.

So a fiscal provision is applied to the droit de suite in order to construe it.

This fiscal provision is used by authors and auctioneers to determine how many copies of a work of art can generate droit de suite royalties.

The figure is 8 copies which must be numbered (1/8, 2/8, ... 8/8) and signed by the author. These copies must be executed by the artist or controlled by him (casting of a sculpture). Although original copies (up to 8) can be cast after the author's death (ruling of the cours de cassation in a Rodin case, March 18, 1986).

### **2. Engravings - Agreement between Authors/Auctioneers (11/28/57).**

The parties agreed that concerning engravings, royalties are paid for the sale of up to 100 copies as long as those copies are numbered and signed by the artist.

3. Tapestries - Agreement between authors/auctioneers  
(01/15/58).

The parties agreed, concerning tapestries, that royalties are paid for the sale of up to 6 copies of the same work as long as those copies are supervised by the artist, numbered and signed by him.

The basis in this case is a third of the sales' price.

**COMMENTS**

1. The French law is incomplete. Art. 42 of the March 17, 1957 law needs a décret to be enforced. It has never been issued. So French law relies on an old decree (November 17, 1920) in order to implement the droit de suite provisions of the 1957 law.

Consequences:

- It is questionable whether this decree is still valid. Arguably it has been abrogated by Article 73 of the 1957 law . . . or has not.
- The said decree only deals with auction sales (state of the 1920 law), so part of the 1957 law pertaining to sales made by dealers is not enforceable.

2. Construction of "graphic work": a debate exist whether the word graphic encompasses literary or musical manuscript. The matter has not been settled by courts. Auctioneers' society excludes that from droit de suite, so do most of the law professors.

3. See 1.1 above.

4. 50 years term should be soon expanded to 70 years.

5. Procedure set up by the 1920 law: See Nimmer "legal protection for the artist", Chap. IV French law on proceeds right analyses and critique - No. 45 by Prof. Plaisant - photocopy attached.

6. EEC law: In the following to the "green paper" dealing with copyright and new technologies (June 1988) issued early in 1991, the EEC Commission has scheduled a study on droit de suite, this study could be a prelude to harmonization. It does not seem that the study will be published on time (before December 31, 1992).

#### CASE LAW

Cours d'appel de Paris - 4 èm chambre 28 January 1991 (RIDA No. 130 October 1991 - p. 141).

The cours d'appel de Paris, limits the scope of droit de suite (works generating droit de suite royalties) by construing the works "graphic and plastic work" (Art 42 of the 1957 author's right law).

The court states that Art. 42 must be construed in a narrow way because it is a particular rule departing from the general rule.

It denies the status of original work to pieces of furniture created by a well known "art déco" artists (Jean Dunand), because:

- he only intellectually created them;

- he didn't create them with his own hands, actually make them.

The court keeps out of the scope of Art 42 every single "design" work, in doing so it seems that it is violating Art 2, 1957 (no discrimination whatsoever between the works).

It seems that the court would have had another view if the same pieces of furniture have been involved in a reproduction right litigation.

It is arguable to say that the "cours de cassation" (French highest court) could reverse this decision on several grounds.

CD/Le 28 Mai 1991

<b>LE DROIT DE SUITE EN FRANCE</b>
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Introduit à l'origine par la loi du 20 Mai 1920, complétée par la loi du 27 Octobre 1922 et différents décrets et arrêtés, le droit de suite prévu par l'article 42 de la loi du 11 Mars 1957 sur la propriété littéraire et artistique peut être défini comme le droit pour l'auteur et, après le décès de celui-ci, pour ses héritiers - pendant 50 ans - de percevoir un droit égal à un pourcentage du prix d'une oeuvre d'art payé en cas de vente publique ou par un commerçant.

Le droit de suite a pour but de réparer une injustice : un artiste a souvent vendu ses oeuvres à bas prix ; la notoriété venue, ses oeuvres sont parfois revendues à de hauts cours et ce sont les cessionnaires successifs qui bénéficient de plus-values énormes.

Il a paru équitable que l'artiste recueille une part, d'ailleurs modeste, de ces augmentations de prix.

## **I NATURE DU DROIT DE SUITE**

Le droit de suite est un droit patrimonial. Comportant des prérogatives différentes de celles attachées au droit de reproduction et de représentation, l'artiste n'ayant pas qualité pour soumettre à son consentement les aliénations successives de l'oeuvre, il contient cependant comme eux une exclusivité qui a pour point d'application un prélèvement sur le prix de vente, au lieu de la reproduction ou de la présentation publique.

C'est un droit d'essence frugifère qui permet de percevoir une redevance au fur et à mesure des aliénations. Ce droit patrimonial existe en tant que virtualité dès la création de l'oeuvre ; il est donc normal de l'incorporer au patrimoine, et en conséquence d'en admettre la transmission héréditaire.

Le droit de suite est un droit inaliénable.  
L'artiste ne peut le céder ou y renoncer.

/...

## II DOMAINE D'APPLICATION

### 1. Les oeuvres

Le droit de suite s'applique aux oeuvres graphiques et plastiques.

En ce qui concerne les oeuvres pour lesquelles plusieurs exemplaires seront vendus (sculptures, gravures, tapisseries, photographies), des conventions entre les représentants des artistes et les commissaires priseurs font jouer le droit de suite sur un petit nombre d'exemplaires, considérés comme émanant de la main de l'artiste lui-même.

### 2. Les ventes

De par la loi du 11 Mars 1957 sur la propriété littéraire et artistique, le droit de suite est perçu sur toutes les ventes aux enchères publiques, ainsi que celles faites par l'intermédiaire d'un commerçant.

### 3. Les bénéficiaires

a) L'auteur : de son vivant, seul l'artiste jouit du droit de suite.

b) Les héritiers et le conjoint survivant : Le droit de suite se transmet aux seuls héritiers légaux dans l'ordre de la dévolution successorale qui ont accepté la succession.

Le conjoint survivant contre lequel n'existe pas un jugement passé en force de chose jugée de séparation de corps ou de divorce bénéficie du droit de suite, mais pour l'usufruit seulement et compte-tenu des droits des héritiers réservataires, s'il en existe.

c) Les artistes étrangers : la perception du droit de suite par les artistes étrangers pour leurs oeuvres vendues en France est soumise à la réserve de réciprocité prévue par l'article 14ter du texte de Paris de la Convention de Berne sur la propriété littéraire et artistique, selon lequel la protection n'est exigible dans chaque pays parties à la Convention que si la législation nationale de l'auteur admet cette protection, et dans la mesure où le permet la législation du pays où cette protection est réclamée.

Le décret du 15 Septembre 1956 maintient cette règle en y ajoutant une exception à la réciprocité pour les artistes étrangers qui ont vécu au moins cinq ans sur le territoire de la France et y ont participé à la vie de l'art.

/...



#### 4. Durée

Après le décès de l'auteur, le droit subsiste pendant l'année civile en cours et les cinquante années suivantes.

### III MODALITES D'APPLICATION

#### 1. L'assiette servant de base

Le droit de suite est exercé sous la forme d'un prélèvement sur le prix de vente et à chacune des différentes ventes successives de l'oeuvre. En cas de vente de plusieurs oeuvres du même artiste, le droit de suite est déterminé oeuvre par oeuvre, et non globalement.

#### 2. Le taux

L'article 42 de la loi du 11 Mars 1957 a fixé un taux uniforme de 3 p 100 applicable lorsque le prix de vente est supérieur à 100 Francs.

#### 3. La perception

C'est le vendeur qui a la charge du droit de suite. Ce droit est réservé :

soit par une Société de perception et de répartition de droits d'auteurs qui le reverse à l'auteur y adhérant après déduction de frais de gestion,

soit directement par l'auteur ou ses ayants-droit ; ceux-ci doivent faire valoir leur droit auprès du commissaire priseur au plus tard trois jours après la vente.

Dans la pratique, la perception est faite le plus souvent par l'intermédiaire de :

- . la SPADEN (Société des Auteurs Visuels)  
15, Rue Saint Nicolas 75012 PARIS, Tel. 4342 58 58
- . l'ADAGP (Société des Auteurs dans les Arts Graphiques et Plastiques) 11, Rue Berryer 75008 PARIS, Tel. 45 61 03 87

### IV POINT DE VUE GENERAL DES ARTISTES ET DE LEURS AYANTS-DROIT VIS A VIS DU DROIT DE SUITE

Les artistes français et leurs ayants-droit approuvent unanimement la perception de ce droit qui ne nuit aucunement à leur carrière artistique, pas plus qu'au marché de l'art.

/...

Si toutefois les artistes eux-mêmes mettent en vente une ou plusieurs de leurs œuvres, la perception du droit de suite est alors inopérante.

Ce droit revenant à l'artiste ne lui procure pas seulement une juste rémunération, il lui apporte également une information précieuse sur la circulation de ses œuvres en France - et dans les pays où le droit de suite est reconnu - à laquelle s'ajoute celle de la connaissance de l'évolution de sa cote, puisque sur les bordereaux qui accompagnent le règlement aux auteurs figurent le lieu de la vente, l'heure, le titre et les dimensions de l'œuvre ainsi que son prix de vente.

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Annexe 1 : Lois et Réglementations

Annexe 2 : Interprétation de l'article 42 de la loi du 11 Mars 1957 par la Chambre Nationale des Commissaires Priseurs

Annexe 3 : Conventions entre les représentants des artistes et les Commissaires Priseurs.

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## LOIS ET RÉGLEMENTATIONS

### MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION

#### Décret n° 81-255 du 3 mars 1981 sur la répression des fraudes en matière de transaction d'œuvres d'art et d'objets de collection

Le Premier ministre.

Sur le rapport du garde des sceaux, ministre de la justice, du ministre de l'agriculture et du ministre de la culture et de la communication.

Vu le code civil, et notamment ses articles 1109, 1110, 1116, 1131 et 1641 ;

Vu le code général des impôts, et notamment son annexe III (art. 71) ;

Vu le code pénal, et notamment son article R.25, complété par le décret n° 80-567 du 18 juillet 1980 ;

Vu la loi du 9 février 1895 sur les fraudes en matière artistique ;

Vu la loi du 1<sup>er</sup> août 1905 sur les fraudes et falsifications en matière de produits et de services et notamment son article 11, ensemble les textes qui l'ont modifiée, notamment la loi n° 78-23 du 10 janvier 1978 ;

Vu le décret modifié du 22 janvier 1919 pris pour l'application de la loi du 1<sup>er</sup> août 1905 susvisée ;

Vu le décret n° 50-813 du 29 juin 1950 relatif au commerce du meuble, modifié par le décret n° 66-178 du 24 mars 1966 ;

Vu le décret n° 56-1181 du 21 novembre 1956 modifiant le tarif des commissaires-priseurs ;

Vu le décret n° 68-786 du 29 août 1968 relatif à la police du commerce de revendeurs d'objets mobiliers ;

Le Conseil d'Etat (section de l'intérieur) entendu.

Décète :

Art. 1<sup>er</sup>. - Les vendeurs habituels ou occasionnels d'œuvres d'art ou d'objets de collection ou leurs mandataires, ainsi que les officiers publics ou ministériels procédant à une vente publique aux enchères doivent, si l'acquéreur le demande, lui délivrer une facture, quittance, bordereau de vente ou extrait du procès-verbal de la vente publique contenant les spécifications qu'ils auront avancées quant à la nature, la composition, l'origine et l'ancienneté de la chose vendue.

Art. 2. - La dénomination d'une œuvre ou d'un objet lorsqu'elle est uniquement et immédiatement suivie de la référence à une période historique, un siècle ou une époque, garantit l'acheteur que cette œuvre ou objet a été effectivement produit au cours de la période de référence.

Lorsqu'une ou plusieurs parties de l'œuvre ou objet sont de fabrication postérieure, l'acquéreur doit en être informé.

Art. 3. - A moins qu'elle ne soit accompagnée d'une réserve expresse sur l'authenticité, l'indication qu'une œuvre ou un objet porte la signature ou l'estampille d'un artiste entraîne la garantie que l'artiste mentionné en est effectivement l'auteur.

Le même effet s'attache à l'emploi du terme « par » ou « de » suivi de la désignation de l'auteur.

Il en va de même lorsque le nom de l'artiste est immédiatement suivi de la désignation ou du titre de l'œuvre.

Art. 4. - L'emploi du terme « attribué à » suivi d'un nom d'artiste garantit que l'œuvre ou l'objet a été exécuté pendant la période de production de l'artiste mentionné et que des présomptions sérieuses désignent celui-ci comme l'auteur vraisemblable.

Art. 5. - L'emploi des termes « atelier de » suivis d'un nom d'artiste garantit que l'œuvre a été exécutée dans l'atelier du maître cité ou sous sa direction.

La mention d'un atelier est obligatoirement suivie d'une indication d'époque dans le cas d'un atelier familial ayant conservé le même nom sur plusieurs générations.

Art. 6. - L'emploi des termes « école de » suivis d'un nom d'artiste entraîne la garantie que l'auteur de l'œuvre a été l'élève du maître cité, a notoirement subi son influence ou bénéficié de sa technique. Ces termes ne peuvent s'appliquer qu'à une œuvre exécutée du vivant de l'artiste ou dans un délai inférieur à cinquante ans après sa mort.

Lorsqu'il se réfère à un lieu précis, l'emploi du terme « école de » garantit que l'œuvre a été exécutée pendant la durée d'existence du mouvement artistique désigné, dont l'époque doit être précisée et par un artiste ayant participé à ce mouvement.

Art. 7. - Les expressions « dans le goût de », « style », « manière de », « genre de », « d'après », « façon de », ne confèrent aucune garantie particulière d'identité d'artiste, date de l'œuvre, ou d'école.

Art. 8. - Tout fac-similé, surmoulage, copie ou autre reproduction d'une œuvre d'art ou d'un objet de collection doit être désigné comme tel.

Art. 9. - Tout fac-similé, surmoulage, copie ou autre reproduction d'une œuvre d'art originale au sens de l'article 71 de l'annexe III du code général des impôts, exécuté postérieurement à la date d'entrée en vigueur du présent décret, doit porter de manière visible et indélébile la mention « Reproduction ».

Art. 10. - Quiconque aura contrevenu aux dispositions des articles 1<sup>er</sup> et 9 du présent décret sera passible des amendes prévues pour les contraventions de la cinquième classe.

Art. 11. - Le garde des sceaux, ministre de la justice, le ministre de l'agriculture et le ministre de la culture et de la communication sont chargés, chacun en ce qui le concerne, de l'exécution du présent décret, qui sera publié au *Journal Officiel* de la République française.

Fait à Paris, le 3 mars 1981.

RAYMOND BARRE.

Par le Premier ministre :

Le ministre de la culture  
et de la communication.

JEAN-PHILIPPE LECAT.

Le garde des sceaux,  
ministre de la justice,  
ALAIN PEYREFITTE.

Le ministre de l'agriculture,  
PIERRE MÉNAGNERIE.

### Section 3 Productions originales de l'art statuaire de la sculpture et assemblages artistiques

1. L'article 71-3° de l'annexe III au CGI considère comme œuvres d'art originales, les productions en toutes matières de l'art statuaire ou de la sculpture et assemblages, à l'exception des articles de bijouterie, d'orfèvrerie et de joaillerie, dès lors que ces productions et assemblages sont entièrement exécutés de la main de l'artiste. Le même article précise que sont également considérées comme œuvres d'art originales, les fontes de sculpture à tirage limité à huit exemplaires et contrôlé par l'artiste ou ses ayants droit.

Ces productions sont parfois obtenues par taille directe dans des matières dures. Lorsque l'artiste réalise des modèles en matière molle (maquette, projet, modèle plâtre) destinés soit à être durcis au feu, soit à être reproduits en matières dures, soit à confectionner des moules pour la fonte de métal ou d'autres matières, ces maquettes, projets, modèles plâtre sont réputés également œuvres d'art originales.

2. Par assemblages artistiques considérés comme œuvres d'art originales, il convient d'entendre les éléments montés en vue de constituer un exemplaire unique d'œuvre d'art entièrement exécuté à la main par un sculpteur ou un statuaire (R.M. n° 24933, M. de Broglie, député, J.O., déb. AN, n° 11 du 13 mars 1976, p. 1012).

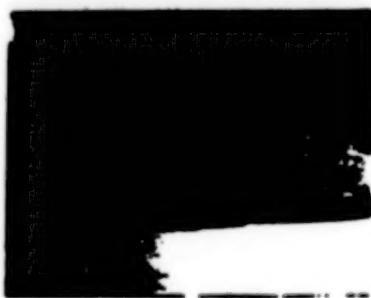
Sont également considérées comme œuvres d'art originales les fontes de sculpture exécutées à partir d'un moulage de la première œuvre, sous réserve que leur tirage soit contrôlé par l'artiste ou ses ayants droit et limité à huit exemplaires numérotés. Les tirages dits « d'artiste » portant des mentions spéciales sont admis au même régime dans la limite de quatre exemplaires.

La condition du numérotage n'est exigée que pour les fontes exécutées depuis le 1<sup>er</sup> janvier 1968.

4. En revanche, la qualité d'œuvre d'art originale doit être refusée :

- aux moules pour les fontes de sculpture ;
- aux productions artisanales ou de série ainsi qu'aux œuvres exécutées par des moyens mécaniques, photomécaniques ou chimiques ; il en est ainsi notamment des articles de bijouterie, d'orfèvrerie et de joaillerie.

Exemplaire d'artiste signé Zadkine



### Les exemplaires originaux ou authentiques

Le terme « Œuvre d'art originale » n'est possible à décerner à une statue en bronze que si son tirage n'excède pas huit exemplaires ~~hors~~ quatre hors du commerce. Les quatre exemplaires hors du commerce portent les lettres E.A. ce qui signifie « Exemplaire d'artiste ». Au-delà de huit exemplaires il s'agit d'œuvres pouvant être considérées comme bronze d'art, de série ou d'édition mais pas comme « Œuvre d'art originale ».

Il est à noter que la totalité des exemplaires peut être coulée en une seule campagne de fonte ou bien s'échelonner sur plusieurs années. Les héritiers et ayants droit continuent aujourd'hui à reproduire en bronze des œuvres de Germaine Richier, Auguste Renoir ou Maillol tant que le tirage maximum n'a pas été atteint (8/8).

Il n'est pas fixé de minimum au tirage des exemplaires numérotés et un sculpteur peut fort bien décider de faire fondre un nombre d'exemplaires inférieur à huit. Son œuvre n'en aura que plus de valeur.

En résumé on distingue :

- 1° les œuvres uniques (1/1),
- 2° les œuvres d'art originales (1/8 jusqu'à 8/8),
- 3° les œuvres d'art (pas de limite à la numérotation. Exemple : 1/15 jusqu'à 15/15 ou plus),
- 4° le bronze d'édition (pas de numérotation et un très grand nombre d'exemplaires sont réalisés. Exemple : 100 - 500 - 1 000 ou plus).

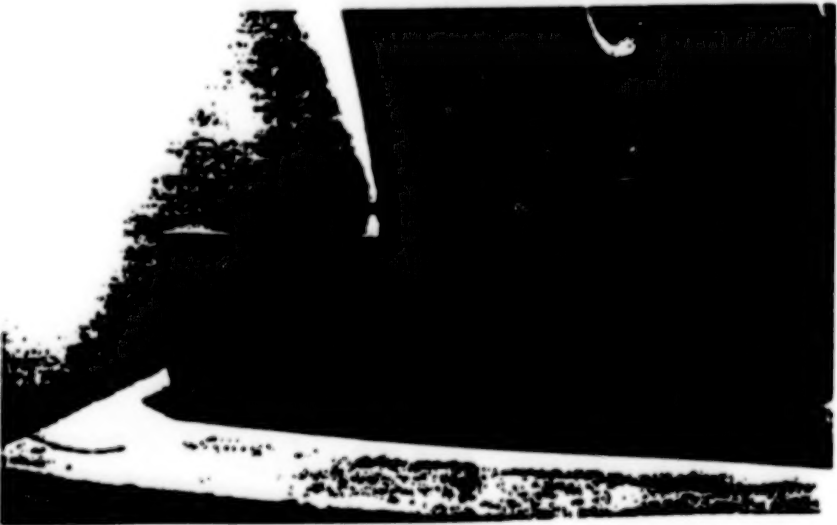
### Le bronze d'édition

Le bronze d'édition est un bronze dont le modèle original a été vendu par l'artiste ou ses ayants droit à un fondeur ou à un éditeur d'art. Le fondeur peut donc en faire fondre un nombre illimité. Généralement le nom du fondeur et du sculpteur figure sur le bronze réalisé. Il ne faut pas confondre le bronze d'édition avec les œuvres numérotées ou l'artiste décide de faire fondre une petite série de la même œuvre. Dans ce cas les exemplaires doivent être numérotés dans le bronze lui-même. Exemple : 1/8, 2/8, 3/6, etc.



Bronze d'édition. Statue d'appartement

Œuvre d'art authentique 4/5 signé Zadkine



**Commentaire et résumé  
sur la législation des œuvres d'art  
dans la statuaire en bronze**

Ne peuvent être considérés comme des exemplaires dont le tirage n'excède pas huit exemplaires numérotés de 1/8 jusqu'à 8/8.

On peut tirer en plus de ces huit exemplaires 4 exemplaires d'artiste non commercialisables et portant une mention spéciale. Exemple : les lettres E.A ce qui signifie « exemplaire d'artiste » suivies de la numérotation 1/4 jusqu'à 4/4.  
L'application de cette loi est obligatoire pour les fontes exécutées à partir du 1<sup>er</sup> janvier 1968.

Le législateur n'a rien prévu concernant les agrandissements ou les réductions des modèles. Ce point de détail permet donc, lorsque le tirage maximum d'une œuvre a été atteint. (Ex. 1/1) de faire varier l'échelle du modèle et de recommencer une série de huit exemplaires dans une nouvelle échelle. Dans ce cas les nouveaux exemplaires réalisés seront considérés comme Œuvres d'art mais non plus comme Œuvres d'art originales.

L'échelle des modèles en réduction ou en agrandissement est illimitée. Exemple : agrandissement 1,2 ou 1,3 ou 1,4 jusqu'à 10 ou 15 fois l'original. On comprend donc qu'un tirage presque illimité d'une Œuvre d'art peut être réalisé dans des échelles différentes certes, mais parfois peu perceptibles à l'œil.

Les exemplaires numérotés doivent donc être considérés comme « Œuvres d'art originales » jusqu'à concurrence de huit exemplaires mais dans une échelle donnée (celle de l'artiste).

Parfois, une petite lettre (c.d.e.) est apposée à côté de la numérotation de l'œuvre. Cette lettre est un code qui renvoie à l'échelle dans laquelle la série des huit exemplaires numérotés a été fabriquée. Il est donc bien difficile de savoir le tirage exact réalisé d'une Œuvre d'art numérotée si le sculpteur ou les ayants droit ont décidé d'agrandir ou de réduire un modèle donné et cela peut s'échelonner ne l'oublions pas, sur plusieurs années.

La protection et la législation des « Œuvres d'art originales » est donc valable pour une série de 8 mais dans une échelle donnée (c'est-à-dire celle voulue par l'artiste).



*Fonte monumentale en bronze. Ensemble animalier (jardin des Tuileries, Paris).*



*Habit de Fondateur*

*Costume emblématique des fondeurs avec les attributs de fabrication courante. Bronze d'ameublement : cloche, statues, objets religieux et militaires, robinetteries, chandeliers, bougeoirs, etc.*



## V. - APPENDICE. INTERPRÉTATION PAR LA CHAMBRE NATIONALE DES COMMISSAIRES-PRISEURS

25. - Interprétation de l'article 42 par la Chambre nationale des commissaires-priseurs (Gaz. Pal. 18 juill. 1958) :

1° Le droit de suite inaliénable est dû aux auteurs d'œuvres graphiques et plastiques pendant leur vie et après leur décès, pendant l'année en cours et les cinquante années suivantes (augmentées des années de guerre), à ceux de leurs successeurs désignés sous le paragraphe 7 ci-après, à la condition que le ou les bénéficiaires manifestent leur volonté de le percevoir.

Le décret fixant les conditions dans lesquelles cette manifestation de volonté devra s'exprimer n'ayant pas encore paru, le droit commun s'applique pour cette manifestation de volonté aux commissaires-priseurs ou officiers vendeurs :

2° L'expression œuvres graphiques et plastiques comprend : les peintures, les dessins, les sculptures et les reliures originales dans tous les cas, les gravures et les tapisseries lorsqu'elles ont le caractère d'œuvre originale dans les conditions fixées par des accords intervenus entre la Chambre nationale des commissaires-priseurs et les représentants des groupements d'auteurs intéressés :

3° Les textes originaux des œuvres littéraires et musicales ne sont pas des œuvres graphiques et ne donnent jamais naissance au droit de suite :

4° Les livres, même contenant des gravures, ne donnent naissance au droit de suite que pour la reliure originale qui les habille, ou pour les dessins originaux qui peuvent y être insérés :

5° Le droit de suite n'est perçu que sur la vente des œuvres dont le prix d'adjudication est égal ou supérieur à 100 francs et il est perçu sur la totalité du prix.

S'il s'agit d'une reliure ou d'un dessin inséré dans un livre, le droit de suite, n'est perçu que si la portion de prix afférente à la reliure ou au dessin, d'après l'estimation du commissaire-priseur, est égale ou supérieure à 100 francs :

6° Le taux uniforme du droit de suite, perçu sur la totalité du prix ou de la portion de prix, est de 3 % :

7° Après le décès de l'auteur, ses successeurs, habilités par la loi à percevoir le droit de suite qui subsiste à leur profit pendant un temps qui ne peut excéder le délai ci-dessus fixé, sont les suivants :

a) Ses héritiers réservataires même si l'auteur a institué un légataire ou un donataire universel ;

b) Ses héritiers « *ab intestat* », non réservataires (venus à la succession à défaut de légataire ou donataire universel ou comme étant l'un de ces derniers) ;

c) Le conjoint survivant, mais pour l'usufruit seulement, compte tenu des droits des héritiers réservataires, s'il en existe (cet usufruit cesse en cas de remariage du conjoint).

En conséquence, à défaut de conjoint survivant et d'héritiers réservataires, et si l'auteur a institué un légataire ou donataire universel, ou si la succession est dévolue à un successeur irrégulier, qu'il soit ou pas un héritier, le droit de suite cesse d'être perçu :

8° Après le décès d'un héritier de l'auteur bénéficiaire du droit de suite, ce droit ne subsiste, pour sa part, que s'il laisse lui-même des héritiers réservataires, et ainsi de suite.

A défaut d'héritier réservataire, la part de l'héritier décédé accroît celle des héritiers survivants s'il en existe ; s'il n'en existe pas, le droit de suite cesse d'être perçu :

9° Aucun ayant cause de l'auteur autre que ses successeurs ci-dessus désignés, aucun ayant cause d'un héritier de l'auteur autre que les héritiers réservataires ne peuvent prétendre à la perception du droit de suite.

Pour l'application pratique de la loi nouvelle, tous renseignements peuvent être demandés par les commissaires-priseurs et les officiers ministériels vendeurs au secrétariat de la Chambre nationale des commissaires-priseurs, 6, rue Rossini, à Paris.

On note que, sans prendre parti de manière explicite, la chambre paraît adopter l'interprétation donnée par la Cour de cassation (1<sup>re</sup> ch.) dans son arrêt du 19 octobre 1977, Utrillo, en réservant le bénéfice du droit de suite aux héritiers appartenant à la « famille » de l'auteur.



**PROCES - VERBAL**

de la Réunion du 28 Novembre 1957, tenue à 10 H. 30

au siège de la Chambre des Commissaires-Priseurs

sous la Présidence de M. Philippe COUTURIER

Président de la Chambre des Commissaires-Priseurs de la Seine

Étaient présents :

- M. ADER - Président de la Chambre Nationale des Commissaires-Priseurs 6, rue Rossini  
GIARD - Commissaire-Priseur, Président d'Honneur des Chambres Nationales et de la Seine, 6, rue Rossini  
GUIOT - Président de la Chambre Syndicale de l'Estampe et du Dessin, 4, rue Volney  
MONTAGNAC - Président de la S.D.A.A. 12, rue Honnor  
PARTURIER - Président de l'A.D.A.G.P. 11, rue Berryer  
GROCHAIRE - Artiste-Peintre et graveur, 47, rue Sarrette  
GUASTALLA - Artiste - Peintre et graveur 16, rue Massonnet  
MENDES-FRANCE - Artiste-Peintre et graveur, 58 bis, rue Ramey  
MOULARD - Secrétaire Général de l'A.D.A.G.P. 11, rue Berryer, faisant fonction de Secrétaire de Séance.

Les soussignés déclarent s'être réunis en vue d'établir, en ce qui concerne l'estampe une interprétation conventionnelle et un accord d'application des textes de la loi accordant à l'auteur d'œuvres graphiques "nonobstant toute cession de l'œuvre originale, un droit de suite sur toute vente de cette œuvre faite aux enchères publiques ou par l'intermédiaire d'un commerçant" (Art. 42 de la loi du 11 mars 1957).

Cette interprétation leur a paru nécessaire, en raison du caractère particulier de l'estampe, dont le tirage à plusieurs exemplaires aurait pu avoir pour effet de faire refuser à son auteur toute perception de droit de suite, suivant le principe, sujet d'ailleurs à controverse, qu'une œuvre originale est nécessairement unique.

Ils estiment, en effet, qu'un accord d'interprétation de la loi établi entre les représentants des Commissaires-Priseurs, des commerçants en estampes et des deux Sociétés de perception (S.P.A.D.E. et A.D.A.G.P.) en présence de trois graveurs, est susceptible d'éviter tout litige dans l'application de la loi sur le droit de suite dont la grande concision pourrait donner lieu, à défaut d'accord, à des recours fréquents à l'intervention des Tribunaux.

Ne pouvant toutefois affirmer que l'éventualité d'un recours au Tribunal puisse être évitée dans l'avenir, et n'ayant pas qualité pour y renoncer, les soussignés conviennent que le présent accord sera considéré par eux, jusqu'à jurisprudence contraire, comme engageant d'une part les commissaires-priseurs ou les commerçants en estampes, et d'autre part, les 2 Sociétés de perception et leurs adhérents.

N. M. H. I. P. M. M. B. P. .../...

~~TOP SECRET~~

Président de la Chambre des Commissaires-Priseurs de la Seine

12.8.92 m-74 WNM RNF Sj ...

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d'une part les commissaires-priseurs ou les commerçants en ce temps, et d'autre part, les 2 Sociétés de perception et leurs adhérents.

ACCORD PARTICULIER POUR LA PERCEPTION DU DROIT DE SUITE -

Pour la perception du droit de suite seulement, les soussignés établissent les conventions suivantes, dans le cadre des considérations exprimées ci-dessus :

Sont considérées comme œuvres originales donnant lieu à perception de droit de suite, les tapisseries à tirage limité à 6 exemplaires au maximum et éventuellement numérotés, portant la signature du peintre cartonnier tissés dans le corps de l'ouvrage et en outre, sa signature autographe apposée sur un "baldac" fixé à la tapisserie et portant l'indication du tirage maximum, ~~comme que le numéro de l'exemplaire~~.

(de l'artiste ou)  
Une attestation des ayants droit d'un artiste décédé peut suppléer à l'absence de baldac.

Le droit de suite sera perçu sur 1/3 du prix de vente de la tapisserie.

Les soussignés déclarent reconnaître le caractère conventionnel du présent accord, qu'ils estiment être conformes à l'esprit du législateur, qui n'a pu ni vouloir refuser au peintre cartonnier de tapisserie tout droit de suite sur son œuvre, ni vouloir étendre ce droit dans sa totalité à des tirages multiples, ~~se plaçant davantage dans le cadre de l'addition que dans celui de l'œuvre originale.~~

Les présentes conventions sont applicables à compter du 1er janvier 1958.

Fait à Paris le 15 ~~juin~~ juin 1958 comme ci-dessus et signé pour accord par tous les participants.

Montagne Joillien  
pro Jean Lucat S. Lery  
Garbay Jean Michel de Saint  
Hubert E. Romani  
Marcel Sartre Antoine  
1/2. M. M. M.



MAINTIEN DE LA DEFINITION ADMINISTRATIVE DE L'ESTAMPE ORIGINALE -

Préalablement à l'accord spécial concernant le droit de suite au profit des artistes graveurs, les soussignés déclarent bien connaître la définition de "l'estampe originale" telle qu'elle a été admise par l'Administration française depuis l'année 1932 et qui est la suivante :

- " Sont considérées comme gravures, estampes et lithographies originales, les œuvres tirées directement en noir ou en couleurs, d'une ou plusieurs planches entières, recant exécutées à la main par l'artiste, quelle que soit la technique ou la matière employée, à l'exclusion de tous procédés mécaniques ou photo-mécaniques".

Et ils déclarent ne vouloir apporter aucune modification de forme ou de fond à cette définition administrative.

"ACCORD PARTICULIER POUR LA PERCEPTION DU DROIT DE SUITE -

Mais pour la perception du droit de suite seulement, les soussignés établissent conventions suivantes, dans le cadre des considérations exprimées ci-dessus :

1°) Les estampes originales de premier tirage, composées et gravées de la main de l'artiste, ainsi que les épreuves d'essai ou d'état préalables au premier tirage, sont seules considérées comme ayant le caractère d'œuvre graphique originale dont la vente donne lieu à perception du droit de suite..

2°) Ce droit est calculé sur la totalité du prix de vente des estampes définies dans le paragraphe précédent, si elles sont signées de l'artiste, numérotées et tirées à un nombre maximum de 75 exemplaires; les épreuves d'essai ou d'état de ces estampes supportent également le droit de suite sur la totalité du prix de vente, si elles sont signées de l'artiste et numérotées, et si leur nombre ne dépasse pas 25 au total.

3°) Ce droit est calculé sur la moitié seulement du prix de vente, si les estampes définies dans le § 1° ne remplissent pas les trois conditions déterminées dans le § 2° (signature, numérotage, tirage à 75 exemplaires maximum), les épreuves d'essai ou d'état de ces estampes, ainsi que celles des estampes définies dans le paragraphe 2° si leur nombre dépasse 25 supportent également le droit de suite sur la moitié seulement du prix de vente.

Cette distinction est motivée par le fait que cette dernière catégorie d'Estampes perd partiellement son caractère d'œuvre graphique originale, et qu'il s'y substitue un caractère d'édition originale qui ne donnerait pas naissance au droit de suite.

Les soussignés déclarent reconnaître le caractère conventionnel du présent accord, qu'ils estiment être conformes à l'esprit du législateur, qui n'a pu ni vouloir refuser à l'artiste-graveur tout droit de suite sur son œuvre, ni vouloir étendre ce droit à sa totalité à des tirages multiples se plaçant davantage dans le cadre de la reproduction que dans celui de l'œuvre graphique originale.

Les présentes conventions sont applicables à compter du 1er janvier 1958.

Fait à Paris le 15 janvier 1958 comme ci-dessus et signé pour accord par tous les participants.

Montagna  
 Marcel Cartier  
 J. Gualtiera  
 P. Gualtiera  
 63



**ART DEALERS ASSOCIATION OF AMERICA, INC.**  
575 MADISON AVENUE, NEW YORK, N.Y. 10022  
Phone: (212) 940-8590

Comment Letter

RM 91-1

No. 11

ARGUMENTS AGAINST THE RESALE ROYALTY

1. The resale royalty is not a royalty. A royalty is a negotiated payment for the license of a copyrighted or patented article. The "resale royalty" is really a tax imposed on the seller by the government for the benefit of the artist; it is forced profit sharing.

2. There is a secondary market for the work of only a tiny percentage of all living artists and those artists who have died within the past 50 years. The resale royalty, therefore, will benefit only a tiny percentage of artists -- those which are most successful. It will also inhibit the sale of those works which are the most difficult to sell -- those of younger and less successful artists. The royalty amounts to a reverse Robin Hood; it takes from the poor to give to the rich.

3. When an artist's work is resold at a high price, the works which the artist has retained and has not sold become more valuable. In addition, the artist's prices for new work will rise. The artist, therefore, does share in the appreciated value of his or her work. The number of artists who are exceptions to this rule are few, and they will receive relatively little compensation from the resale royalty.

4. More than 99% of all works of art created in a given year do not appreciate in value; they decline, if they can be sold at all. Is it fair that artists share in the rare profit when they are not asked to share in the usual loss,

5. If the basic principle behind the resale royalty is correct, why is it limited to visual artists? Why not apply it across the board to designers, architects, craftspersons, etc.?

6. The resale royalty is unfair to collectors who take considerable risks in supporting younger artists. Although most of that work declines in value, the collectors are not indemnified by artists and cannot take a tax deduction because collecting is a "hobby" under the tax laws. With respect to the relatively small percentage of works which appreciate, however, the seller must pay federal and state income taxes, as well as an additional 7% tax to the artist. Collectors must also place the transaction on the public record by registering in Washington.

7. The 7% additional tax coupled with the registration requirement will have a chilling effect on the art market, particularly the market for those works which are normally the most difficult to sell, those of younger artists.

a) The commercial self-interest of dealers is in selling the works of their artists. In this respect, the interests of dealers and artists are tied together. If sales are inhibited by the resale royalty, dealers and artists both suffer.

b) Dealers, by virtue of their knowledge and experience are in the best position to understand the art market and clearly have a better knowledge of the market than the law professors and artists who claim that the additional 7% tax and the registration of sales will do no harm. All economic studies by disinterested economists support the position that the additional 7% tax will damage the market.

c) The resale royalty may inhibit purchases by those who buy only for social status or for investment. But the motives of buyers are not always clear. Although it is easy to talk about shaking out a few "undesirable" collectors, the loss of a few sales can mean a great deal for a young artist who sells relatively few works.

d) The resale royalty has not worked in California, where it is widely ignored. The resale royalty is based upon the French droit de suite. But the existence of this law has inhibited the development of the healthy art market which artists need in the small number of countries which have adopted it. Overregulation of the French art market has caused its decline. At the same time, England, which has a less vibrant general economy than that of France but which does not have the French system of art market regulation, has developed a very healthy art market.

8. It is argued that the New York art market has flourished notwithstanding the high (8-1/4%) sales tax and that the imposition of a 10% buyers premium has not hurt auction sales. But these arguments miss the point.

a) The 8-1/4% sales tax is applicable only to works sold and delivered to New York residents. The relative number of such sales has actually declined in the past decade. The New York art market has flourished because of sales to non-New Yorkers.

b) The buyers premium is not like the resale royalty. It is really an allocation of the price which the buyer is willing to pay, partly to the auction house and partly to the seller. It is in effect in every major auction house throughout the world.

9. From our experience with the California statute and the New York sales tax, we are fearful that pressure will be brought to evade payment and that a black market in works of art will develop.



ART  
DEALERS  
ASSOCIATION  
OF  
AMERICA,  
INC.



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NEW YORK, N.Y. 10022

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Testimony of R. Frederick Woolworth  
in opposition to H.R. 3221

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Introduction

I am the President of the Art Dealers Association of America, Inc. ("ADAA"), an association of the nation's leading dealers in works of fine art. I appreciate the opportunity to appear today to testify in opposition to the Visual Artists Rights Act, H.R. 3221.

We are opposed to the so-called resale royalty and sales registration requirements in H.R. 3221. While we agree with the intent of the moral rights provisions, there are a number of substantive problems which are raised by the bill as presently drafted.

I have been an art dealer since 1969 when I became the principal owner of the Coe Kerr Gallery in New York City which specializes in 19th and 20th century American works of art. The gallery is active in the primary market, representing living American artists in the exhibition and sale of their work. We also are active in the secondary market, which involves the resale of works of art after they have been sold by the artist. I have

worked for many years on behalf of the artists who we represent. I have sold and bought many works of art and I have advised many collectors. My knowledge of the art market, like that of my colleagues, is not theoretical and is not academic. It comes, rather, from long experience in the field.

The Resale "Royalty" and Sales Registration:

The proposed resale royalty would require the owner of a work of art to pay the artist 7% of any profit resulting from the resale of that work, providing the resale price was more than \$1,000 and more than 150% of the original purchase price, and the artist has registered with the United States Copyright Office. The bill extends this right to the artist's heirs for 50 years after his death. It prohibits the artist from exercising his right to waive payment once the artist has registered. It mandates the public disclosure through registration in the Copyright Office of the details of sales of works of art subject to the bill.

The theory behind the proposed resale royalty is that visual artists should have a continuing economic interest in their work, the realization of which would depend upon resale or successive

resales of their unique creations. The proposal in this bill, however, is really a mandatory profit sharing arrangement or "resale proceed right," a term which may be closer to the French term droit de suite. Indeed, the concept of the droit de suite comes directly from French law.

The goal of enthusiasts for the droit de suite is honorable. After all, the argument that an artist deserves to share in the profits from his creations has seductive appeal. But, anyone who knows the dynamics of the art market realizes that this proposal will have a negative effect on the contemporary art market in the United States, and consequently, on contemporary American artists, particularly young artists who have yet to establish a real market for their work.

The fact is that, contrary to a widely held belief, the works of only a very small percentage of artists appreciate in value; perhaps 300 of approximately 200,000 working artists, have a secondary market for their work. As a consequence, the proposed resale profit sharing scheme would benefit only that very small group, which is comprised largely of already successful artists. Of course, no one can or should object to a

proposal which will benefit even a small group of artists unless there are countervailing considerations. In this case, the countervailing consideration is the damage which this scheme will do to the vast majority of other artists - - those who are less successful than the small number of artists who will benefit from the bill.

Mandatory profit sharing and sales registration, if adopted, will damage the market for works by living artists for a number of reasons:

First, mandatory profit sharing encumbers future sales, thereby depressing the art market. No matter how it is characterized, the effect of this provision is to impose an additional tax on a seller of a work of art, payable to the artist or to the artist's heirs. We have learned through our experience with other taxes that to impose a greater tax on one commodity, which can be readily substituted by another commodity, is to alter the pattern of demand. In any market, a reduction in demand inevitably will be followed by a reduction in the level of prices and the volume of sales.

According to Stephen E. Weil, Deputy Director of the Hirshhorn Museum and author of "Resale

Royalties: Nobody Benefits" (1978), "The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work ... What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw of the resale royalty. It does not seek to increase these funds [but] ... by imposing a discriminatory tax on contemporary art, it would reduce such funds."

Moreover, collectors know that the acquisition of works by living artists is financially risky because so few of those works appreciate in value. When a collector suffers a loss, it is not even tax deductible. In the relatively few cases where there is a profit, the effect of mandatory profit sharing would be to impose an additional tax on top of the federal and state taxes. As a consequence, there would be a considerable financial inducement for collectors to concentrate on areas other than contemporary art where there are fewer risks and where no mandatory profit sharing is compelled. In fact, we have been told by collectors that they would move away from collecting contemporary art should the "resale royalty" be enacted.

The situation is exacerbated by the prohibition in the bill against a waiver by the artist of the right to share in the collector's profit on the resale of the work. Because of the financial risk involved, a collector might well request such a waiver when considering the purchase of a work by a young artist. But the bill prohibits the artist from making an informed choice; the government decides what is in the best interest of the artist. The inability of the artist to waive, even where a waiver would be helpful, will make sales more difficult and works against the interest of artists.

Collectors are further discouraged by the provision for public registration of sales. No one likes to put the details of his or her private purchases or sales on the public record. This is a plain invasion of the right of privacy. No one can reasonably deny that this distasteful provision will have an adverse effect on the art market.

The effect of the mandatory profit sharing provision is also to make it more difficult for dealers to handle the works of less established artists.



In representing an artist, the gallery makes every effort to promote and advance the artist's work and the artist's career. The Coe Kerr Gallery treats all artists alike. We spend approximately \$50,000 for each exhibition of one of our artists. But most of our exhibitions of works by living American artists are not profitable. Our commissions on sales of the work of promising, but unknown, artists generally are not sufficient to pay the costs of the exhibition. Those exhibitions are subsidized, in effect, by our ability to deal profitably in works of more successful artists. To the extent that a dealer's profit is reduced by the adverse effect on sales resulting from mandatory profit sharing, the more difficult it becomes to subsidize exhibitions of younger artists. In the case of smaller galleries, this could well mean a reduction in the number of unprofitable exhibitions of younger artists.

Proponents of mandatory profit sharing incorrectly compare it to the royalties paid to authors and composers. They note that novelists and composers collect royalties from their creations. Consequently, it is argued, painters and sculptors should receive "royalties" as well

when their works are successful. But this argument is inaccurate because novelists and composers receive royalties on infinite reproductions of their works. The so-called resale royalty provision really is a profit sharing arrangement on the sale of the original work. It is like requiring a percentage of the profit on the resale of a first edition to be paid to the author of the book.

The analogous argument would be that visual artists should receive royalties from each reproduction of the "image" of their work (e.g., pictures, post cards, posters, etc.). But artists and sculptors presently can, and in fact do, garner royalties from such reproductions.

An artist who wishes to receive a share of any profit gained upon resale of his works is free to incorporate such a provision in an original sales contract, as some artists now do. Some argue that only successful artists have the leverage to enter into such contractual arrangements. But this is the same limited group of established artists who would be the beneficiaries of the mandatory profit sharing provision. It is unnecessary to legislate such a provision and depress the art market when

these artists are already free to make such a contractual arrangement privately. In essence, the mandatory profit sharing provision imposes such an agreement whether or not the artist believes it desirable in a particular situation.

Artists can effectively "waive" their right to resale royalties only if they do not register with the Copyright Office. In that event none of their works would be subject to mandatory profit sharing. In essence, the proposal creates an all or nothing trap for artists and dealers alike. Once an artist registers the artist loses economic flexibility. Moreover, registration may make it more difficult for some artists to find dealers willing to handle their work. Some dealers may prefer to handle works of artists who are not registered because there are fewer problems in making sales.

It is also argued by the proponents of mandatory profit sharing that it is unfair to deny an artist a continuing economic interest in the artists work, and that it is further unfair to deny artists a share in profits which accrue because of their creative efforts. There are two theoretical and one practical economic responses to this

argument:

First, it should be noted that the proposal for a "continuing economic interest" in the work applies only when the work appreciates in value. No one urges such an interest in the more usual situation of a decline in value of a contemporary work of art.

Second, it is not unusual in our society for the purchaser of the product of the creative efforts of another to profit from those efforts. For example, architects, designers, doctors and lawyers all provide creative services from which their clients profit. If the mandatory profit sharing principal is valid for artists, why is it not valid for everybody throughout the society.

There is, additionally, a practical answer to the so-called fairness argument, and that is that in most cases artists do share in the appreciation in value of their work.

One of the responsibilities of a good art dealer is to provide advice to an artist about the proper management of his or her body of work. Generally, a dealer will advise an artist to hold back or "invest in" the artist's works, in the hope that the value of the works already in the market

will increase. Many artists hold back from selling either as a deliberate choice or because their work does not sell. When the market value of one of the artist's works increases, the value of the remaining body of works in the artist's possession also increases. Moreover, as a general rule the artist is further rewarded when resale prices increase; the artist receives higher prices for the work which the artist currently creates. In sum, virtually all artists benefit economically from an increase in the resale prices of their work even though they do not share directly in profits.

To understand how the art market functions, we need only look at the much publicized sale of artist Robert Rauschenberg's painting "Thaw" in 1973. I imagine you all are familiar with this incident, as it is, after all, the watershed case for all advocates of the resale royalty right.

In 1973, collector Robert Scull sold Robert Rauschenberg's painting "Thaw" for \$85,000 at auction. Mr. Scull had purchased the art work several years earlier for less than \$1,000; a price Mr. Rauschenberg's dealer, Leo Castelli, had established as the "fair market value" at that time. Mr. Rauschenberg reportedly confronted Mr.

Scull after the 1973 auction and exclaimed that he "had been working his ass off" for Scull to make that profit.

But, that landmark sale immeasurably helped Robert Rauschenberg's career. The market value of the art works he held in his studio or the dealer's gallery increased sharply the next day. The sale also established a new price level for the artist's subsequent work. As someone reportedly remarked, Scull made Rauschenberg a millionaire!

Art dealers in the United States today are extremely effective at marketing the works of contemporary artists. Without any government assistance, dealers have played a key role in making the United States the world's most important center for the exhibition and sale of works by living artists with resulting benefits to artists, dealers and many others. It has resulted in increased revenue to the government through additional taxes. Now we say to the government: You haven't helped us; please don't hurt us, and please don't hurt artists.

The advocates of mandatory profit sharing are ideologically committed to an abstract principle to the point that I fear that they are unwilling to



face the adverse consequences. Those of us who are experienced in the art market and who are equally dedicated -- if not more so -- to the well-being of artists know that the price to be paid for the abstract principle of mandatory profit sharing will be destructive to the art market and, consequently to the interests of the vast number of artists.

A cynic might claim that art dealers argue against mandatory profit sharing solely for reasons of their own self-interest. If this is true, then the self-interest involved is a fear of the loss of business, i.e. of sales of works by the artists we represent. And if our fears are justified -- as our experience tells us they are -- then the artists suffer even more than the dealers.

The droit de suite has had an adverse effect on the art market wherever it has been adopted. Paris, once the center of the world art market, is no longer a major center for contemporary art. The adoption of the law in California resulted in a dramatic set-back to what had been a growing art market. For example, Sotheby's, one of our two major auction houses, closed its Los Angeles branch when consignments of works of artists covered by the law dropped dramatically. The gallery

business and sales of works by contemporary artists in California also declined. The recent revival of the California market, mainly in the Los Angeles area, is directly related to the fact that reality has set in and the mandatory profit sharing law is now widely ignored.

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May 31, 1991

### BY EXPRESS MAIL

Office of the Register of Copyrights  
Copyright Office  
James Madison Building  
Room 403  
First and Independence Avenue, S.E.  
Washington, D.C. 20559

Comment Letter

RM 91-1

No. 12

Re: Notice of Inquiry on Resale Royalty Royalties for  
Works of Art (Docket No. RM 91-1, 56 F.R. 4110)

Dear Sir:

I am an attorney practicing in the field of copyright law at the firm of Sidley & Austin in Chicago, Illinois. I am also Vice President of Lawyers for the Creative Arts, a not-for-profit organization that provides pro bono legal services to needy artists. I have reviewed the "Comments on Copyright Office's Request for Information; Study on Resale Royalties for Works of Art" by Volunteer Lawyers for the Arts.\* Subject to my comments below, I agree with these Comments.

The statement in Section 2 that the resale royalties for an artist are parallel to the royalty a writer receives when the public makes use of his or her book is not really accurate. As far as I am aware, under the "first sale doctrine" in the United States, after the first sale of a book, an author does not receive a royalty when that copy of the book is resold at later date.

I disagree with calculating the resale royalty rate according to the gross sales price of the artist's work, as described in Section 2. The overriding purpose of the resale

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\* The latest version of the VLA's Comments that I reviewed was labelled "second draft." My comments are based upon that draft and my references are to that draft. To the extent that my comments differ from the VLA's Comments as finally submitted to the Copyright Office, please disregard them.

Office of the Register of Copyrights  
May 31, 1991  
Page 2

royalty is to compensate an artist for the higher resale prices commanded by the artist's work in later sales (see paragraph 2 on page 1). It does not serve this purpose, nor does it make sense, for the artist to receive a royalty if, for instance, the artist's work is resold at a price that is the same or less than the price for which it was originally bought. This seems to me to be a windfall profit for the artist. Therefore, I believe that the resale royalty rate should be calculated according to the added value of the work, as described in footnote (6).

With regard to the issue of an administrative agency for the resale royalty system discussed in Section 5, the existing Copyright Royalty Tribunal may be an alternative to forming a new private artists' rights society. Although substantial administrative changes would be required for the CRT to assume such responsibility, it may be more efficient than starting a new enforcement society.

Also with regard to the administration of the royalty system, I believe that in order to make a royalty claim for a work, the artist should be required to register the work and the artist's name and address in a central registry. Such a registration system would provide a desirable degree of certainty as to whether a particular work is subject to the royalty and, if so, it could provide information as to how and where to locate the artist.

With respect to the assignability of the right to collect and enforce the resale royalty rights, addressed at the end of Section 5, I believe that an artist should be able to assign the right to his or her creditors. This could benefit an artist to the extent that the artist can use the present value of the resale royalty right to satisfy his or her debts.

Likewise, I disagree with the statement in Section 6 that the resale royalty rights cannot be attached by creditors. If the resale royalty is income for the artist, I see no justification to treat it differently from other forms of income or property, such as the work of art itself or the income the artist is entitled to receive from the original sale of the work.

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As I stated above, other than for the foregoing comments, I support and agree with the "Comments on Copyright Office's Request for Information; Study on Resale Royalties for Works of Art" by Volunteer Lawyers for the Arts.

Respectfully Submitted,

  
Andrew L. Goldstein

cc: Lawyers for the Creative Arts  
Volunteer Lawyers for the Arts

**COMMENTS OF THE  
AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS  
ON COPYRIGHT OFFICE STUDY  
ON RESALE ROYALTIES FOR WORKS OF ART**

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May 31, 1991

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Counsel for American Society  
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Comment Letter
RM 91-1
No. <u>13</u>



**COMMENTS OF THE  
AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS  
ON COPYRIGHT OFFICE STUDY  
ON RESALE ROYALTIES FOR WORKS OF ART**

The American Society of Magazine Photographers (ASMP) is the nation's largest organization representing the interests of freelance professional photographers working in the fields of editorial, corporate, fashion and advertising photography. ASMP's 5,000 members reside throughout the United States and must meet exacting professional standards before qualifying for membership in the organization. Through its 35 chapters in 24 states, its headquarters in New York and its activities in Washington, ASMP has established a national presence on issues of concern to freelance photographers.

Many of these issues arise under the copyright laws, for they provide the legal basis by which photographers control and benefit from reproduction and distribution of their images. Over the last few years, ASMP has sought to preserve the copyright rights of its members through the courts and the Congress. ASMP vigorously supported the position of James Earl Reid in CCNV v. Reid, 490 U.S. 730 (1989), and testified in support of proposed legislation (S. 1253) to confine the work made for hire doctrine to the narrow limits intended by Congress in enacting the 1976 Copyright Act.

During Congress' consideration last year of the Visual Artists Rights Act of 1990, ASMP urged that photography not be excluded from the definition of a "work of visual art." ASMP

argued that photographers, no less than painters and sculptors, were every bit as deserving of the protection afforded by the new rights of attribution and integrity. This position was influenced by three principal considerations. First, photography is a means of creative expression that reflects the unique artistic perspective and skill of the photographer. Second, no basis in the copyright law or the arts exists to justify discriminating against photographers as authors and artists. Third, since photography is entitled to the full range of protection afforded by the 1976 Copyright Act, any amendment to that statute to provide for so-called "moral rights" should be consistent with the approach of the 1976 law.

When the Visual Artists Rights Act of 1990 was enacted, the definition of a "work of visual art" included a limited class of photography. Section 101(2) of the Act defines a "work of visual art" as "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

Now that the Copyright Office is studying the feasibility of resale royalty legislation, ASMP's position is premised on the same considerations mentioned above with respect to the Visual Artists Rights Act. ASMP strongly supports the enactment of resale royalty legislation, and even more strongly urges the Copyright Office to include photography as a work of art for which resale royalties must be paid in the event a favorable

recommendation on such legislation is made to Congress. The basis for ASMP's position, together with its responses to the questions posed in the Copyright Office's Notice of Inquiry, are set forth below.

A. Impact of Resale Royalty Legislation

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how?

Based on its experience in the photography market over the last 50 years, ASMP believes that the enactment of resale royalty legislation would promote the creation of new works of art, and of new photographic images in particular. An established market presently exists for the purchase and resale of single or limited edition prints of photographic images, although the prices that such images command usually do not rise to the level achieved in the resale market for paintings. There are instances, however, in which the renown of the photographer makes his or her images highly sought-after in the resale market. For example, limited edition prints of Ansel Adams photographs such as "Moonrise over Sand" have sold in the \$80,000 range. Recently a record was set when a photograph of Charles Sheeler sold for \$160,000. The images of other photographers such as Man Ray, Walker Evans, Diane Arbus, Robert Ketchum, Winston Link, and Irving Penn are in great demand in the resale market.

Most artists, photographers included, suffer from a fundamental problem, which serves to illustrate why a resale royalty provision would be beneficial. At the time most

photographic images are created and sold, the photographer is generally unknown. As a result, the prices that the images command are usually low -- indeed are often in the \$100-300 range. Like painters, photographers achieve recognition in the marketplace, if at all, after many years of effort. If commercial success is finally achieved, the resale prices for the photographer's images created in the past dramatically increase. But again like painters, photographers do not directly benefit from the rise in resale prices. If they (and their heirs) were able to do so by means of a resale royalty right, a powerful incentive to create new photographic images would be established.

The copyright laws currently provide one set of incentives, but they exist only with respect to the reproduction and distribution of original and derivative images. Resale of tangible works of art is beyond the purview of the present copyright laws, and it is this gap which a resale royalty provision should fill. The promise of securing some benefit from a heightened market appetite for resale of single or limited edition prints would provide another incentive for photographers, many of whom struggle throughout their careers to keep working.

The ultimate beneficiary of a resale royalty scheme would be the public, especially in the case of photographic images. Photography is the one form of art to which virtually the entire public is exposed on a daily basis. The power of the photographic image to convey emotion, evoke a mood or generate a visceral response is well documented in publishing, advertising

and historical contexts. The public's appreciation for that power is, of course, enhanced by the widespread availability and use of cameras, which enable all persons to be photographers of one sort or another. Given this familiarity and appreciation for the photographic image, a public policy that offered additional incentives to professional photographers to create new works would well serve the public interest underlying the copyright laws.

2. How would the legislation affect the marketplace for works of art subject to such a requirement?

Resale royalty legislation would not adversely affect the marketplace for photographic images subject to such a requirement. There is simply no basis for presuming that the existence of a resale royalty would significantly inflate prices set by sellers of photographs, or would in any way discourage prospective buyers from purchasing photographs. To the extent that sellers responded to the resale royalty requirement by increasing prices of single or limited edition photographs, any such increase is likely to be incremental, and in any event would not have any appreciable effect on the market.

B. Scope of Resale Royalty Legislation

1. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover?

Resale royalty legislation should apply at a minimum to all categories of works covered by the Visual Artists Rights Act.



Of particular concern to ASMP is that photography be included in the categories of works covered by resale royalty legislation. If the fundamental purpose of such legislation is to enable the artist to share in the economic growth of his or her own work (growth attributable to the artist's reputation achieved through skill and hard work over an extended period of time), then photographers are no different from painters, sculptors or other fine artists who work in other media. Photographers, like these other artists, are unable to profit from the appreciation in the value of their own work -- which under current law is an opportunity reserved to the seller, through no talent or effort of his own. Since the increase in the value of a single photographic print or limited edition print over time is attributable only to the market's appreciation for the photographer's work, it is equitable to permit the photographer at least to share in the profits earned from that increase in value.

At a minimum, the class of photography covered by the Visual Artists Rights Act should be subject to the resale royalty requirement. But the Copyright Office should consider expanding the category of photographic images eligible for resale royalty benefits beyond the narrow confines of the limits prescribed by that law. There is no reason, for example, to restrict resale royalties to photographic images produced for exhibition purposes only. Many single or limited edition photographic prints on the resale market were not taken for exhibition purposes only, and

thus would not be eligible for resale royalties if the Visual Artists Rights Act definition is adopted. Given the purpose of the resale royalty provision -- to allow the artist to benefit from the increase in market value of his work -- it should make no difference whether the photograph was taken for exhibition purposes only, for a variety of purposes one of which was exhibition, or exclusively for some other purpose.

2. Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be?

ASMP believes that a threshold value is appropriate simply for ease of administration. Based on its knowledge of the photographic market, ASMP suggests that \$250 be adopted for threshold resale prices for photographic images. While this figure may not be appropriate for paintings, the market varies significantly depending upon the type of work of art involved, and photographs as a rule simply do not command the prices that paintings do in the resale market.

3. What should the amount of the resale royalty be and how should it be measured -- by a percentage of the reseller's profit, the net sales differential, or some other measurement?

ASMP believes that a reasonable royalty percentage should be 5%, calculated on the basis of the gross sales price as provided under California law. Ca. Civil Code § 986(a). The 5% figure would allow the photographer to secure a fair share of the

increase in value of the work. Calculation of the amount due on the basis of gross revenues is the only way to avoid the complexity and confusion that would inevitably be associated with any attempt to base the royalty on a percentage of the seller's profit. If the artist's royalties were tied to a percentage of the seller's profits, disputes over the amount and method of calculating those profits would be invited, and the system simply would not work.

C. Beneficiaries

1. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States?

The principal beneficiaries of the resale royalty requirement should be American artists. Irrespective of where a work is created, any artist who is a citizen of or resides in the United States should be eligible for resale royalties as long as his work is either sold in the United States or is sold abroad by a seller who resides in the United States. As for works created by foreign artists, it is fair to afford them resale royalty rights only if their countries grant reciprocal rights to American artists.

D. Term, Descendability and Retroactivity

1. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work?

The resale royalty requirement should be coextensive with the copyright in the work. Adoption of the copyright term is preferable to the limitation to the life of the author of the rights conferred by the Visual Artists Rights Act. Both resale royalties and copyright rights are intended in part to establish incentives that result in economic rewards appropriate to encourage creativity. Given this consistency of economic purpose, both resale royalty and copyright terms should be the same.

Similarly, just as copyright rights are descendible, so too should the resale royalty rights be passed to heirs, legatees or personal representatives.

2. Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

ASMP believes that the resale royalty rights should apply to works created before the effective date. While any retroactive effect on past transactions involving existing works would be unlikely to pass constitutional muster, simply imposing the resale royalty requirement on future transactions involving existing works would not cause disruption of settled expectations. At worst sellers may respond by raising prices of existing works above the level they may have anticipated prior to enactment of resale royalty legislation. Conversely, application of the resale royalty requirement to existing works would have tremendous beneficial effects for American artists who presently

do not share in profits from resale of thousands of existing works of art.

E. Enforcement, Collection, Registration

1. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? Who should record the initial and subsequent sales price?

As a means of ensuring compliance with the resale royalty requirement, sellers of works of art should be required to report all transactions to the Register of Copyrights. The identity of the seller, the date of the sale, the amount of the selling price, and the amount of the royalty should be disclosed in the seller's filing in the Copyright Office. The initial sales price should be reported by the artist or his representative. Precedent for such a recordation system exists under section 113(d)(3) of the Copyright Act (section 604 of the Visual Artists Rights Act), which provides for the recordation of information related to a work of visual art incorporated into a building.

To be effective, the reporting obligation must have teeth. Accordingly, any resale royalty legislation should include a penalty provision requiring a seller to pay to the artist at least three times the amount of the royalty for failure to record a sale. The legislation should expressly authorize the artist to collect "treble royalties" from the seller in an action in federal court.



ASMP believes that central collecting societies would play a crucial role in a successful resale royalties scheme. Whether this function is performed by a single new collection society acting on behalf of all artists, or by various existing organizations representing the interests of artists, it is clear that individual artists cannot reasonably be expected to administer and collect resale royalties.

The collecting societies must be authorized to enforce the resale royalty rights of individual artists. The legislation should permit artists to assign the right to collect and enforce their resale royalty rights to private collection societies, and should authorize those societies to bring enforcement suits on behalf of their members.

2. How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

An artist should not receive a resale royalty in circumstances in which a work of art is transferred by gift. While the recipient of the gift is "profiting" from the transaction in the sense that no compensation is paid, the seller is receiving at most a tax deduction as a result of the transaction. Under these circumstances, where no funds are actually changing hands, it would be unworkable to require the seller to pay a resale royalty.

The same result should not obtain in a barter transaction where the owner of the work of art is receiving

property in exchange for that work. As long as the value of that property meets the threshold \$250 level for photography, the owner of the work of art should be required to pay a resale royalty.

F. Waiver and Alienability

1. Should the right be waivable or alienable?

The resale royalty right should not be waivable by the artist if it is to effectively ensure his or her participation in the increase in economic value of a work over time. Most artists, including photographers, have little bargaining power, especially in the early stages of their careers. If the resale royalty right were waivable, the initial purchaser of a work of art would insist upon waiver of the right as a condition of the sale, especially if he or she planned to sell the work in the future.

For similar reasons, the resale royalty right should not be alienable. If it were, speculators would be encouraged to buy up resale royalty rights of promising artists, and the ultimate beneficiaries of the right would be investors rather than artists.

G. Preemption

1. Should the California law be preempted in the event of a federal law?

One of the advantages of a federal resale royalty system would be nationwide uniformity and applicability. If that advantage is to be realized, federal resale royalty legislation

should preempt the California law at least as to works that are covered by both legislative schemes.



# VOLUNTEER LAWYERS FOR THE ARTS

Comments on Copyright Office's  
Request for Information;  
Study on Resale Royalties for Works of Art  
by Volunteer Lawyers for the Arts

For additional information,  
please contact: Nancy Adelson,  
Associate Director of Legal Services,  
Volunteer Lawyers for the Arts

Comment Letter

RM 91-1

No. 14

Comments on Copyright Office's Request for Information;  
Study on Resale Royalties for Works of Art  
by Volunteer Lawyers for the Arts

Volunteer Lawyers for the Arts ("VLA") is a New York not for profit organization which provides free art-related legal assistance and education to artists and arts organizations in all creative fields otherwise unable to afford such services. VLA's clients include visual artists working in all media, as well as some of their representative organizations. As will be discussed below, VLA supports the enactment of legislation which would permit artists to share in the proceeds generated by subsequent sales, or "resales", of their works. VLA's comments are endorsed by the following not-for-profit organizations which assist artists and art organizations in their geographical regions: The Connecticut Volunteer Lawyers for the Arts; Connecticut Advocates for the Arts; Cleveland Volunteer Lawyers for the Arts; Lawyers for the Crea-

tive Arts; Resources and Counseling for the Arts; St. Louis Volunteer Lawyers and Accountants for the Arts; Washington Area Lawyers for the Arts. (See Appendix for additional information with respect to these organizations).

As an artist gains public recognition, his or her work can generally command higher resale prices. Although profits realized on the resale of a work are due in large part to the artist's reputation, under current law the visual artist does not share in the economic benefit. This inequity can be redressed in part by the enactment of resale royalty legislation. Resale royalties are intended to provide an economic benefit for visual artists analogous to the royalty rights currently enjoyed by composers and writers.

VLA will address in turn the questions raised in the Copyright Office's notice dated February 1, 1991:

1. Would resale royalty legislation promote or discourage the creation of new works of art and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

VLA believes that the adoption of a national resale royalty policy would encourage the creation of



new works of art by recognizing that visual artists, like writers and composers, have an ongoing relationship with the fruits of their creativity and should share in the proceeds these works generate. Resale royalties should not hurt the American art market. The art market is already accustomed to incurring certain charges on the sale of artwork, e.g., commissions from consigners and buyer's premiums to auction houses. Moreover, a substantial number of collectors are art lovers who purchase art for more than anticipated economic gain - many enjoy the aesthetics of the artwork and wish to encourage the art world. VLA believes that the American art market can easily accommodate a modest resale royalty for the artists.

Resale royalty legislation should be uniform and on a federal level rather than on a state-by-state basis, so that sellers of artworks cannot circumvent the legislation by selling in a state which does not recognize resale royalties.

Moreover, if resale royalties were imposed on a state by state basis, it is possible that an artist in a resale royalty jurisdiction would have to discount his original offering price to remain competitive with non-resale royalty jurisdictions. If imposed at a

national level so that all sales were affected uniformly, resale royalties should not be viewed as a negotiable term which would result in decreased sales prices.

In light of the fact that many countries now recognize resale royalties, it is less likely that the imposition of a federal resale royalty would move the American art market outside of the U.S. Currently 28 jurisdictions recognize resale royalties, including: France, Germany, Italy, Belgium, Brazil, Spain, Chile, Hungary, Peru, Czechoslovakia, Turkey, The Phillipines, Uruguay, Portugal, Luxembourg, Monaco, The Congo, The Ivory Coast, Senegal and the State of California.(1)

In France, for example, studies have shown that droit de suite has been successful, and that the French art market has continued to thrive. According to data supplied by Adagp (Societe des auteurs dans les arts graphiques et plastiques), a private organization representing the interests of graphic and plastic artists in France, substantial resale royalties were

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(1) The resale royalty right is currently applied systematically in France, Germany, Belgium and Hungary. Unpublished work by Liliane de Pierredon-Fawcett (Center for Law and the Arts, Columbia University School of Law), herein referred to as Fawcett.

collected in France from 1987 through 1990:

(FF in millions)			
1987	1988	1989	1990
11	26	51	80
(\$1.9 million)	(\$4.5 million)	(\$8.8 million)	(\$13.8 million)

The European Community has placed resale royalty rights legislation on its agenda and is likely to put increasing pressure on the United Kingdom and other non-resale royalty rights countries to conform and recognize these rights. VLA believes that U.S. recognition of resale royalty rights is appropriate and that such recognition will support the current collaborative European efforts.

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

VLA believes that resale royalty legislation should be modeled on the French droit de suite, which assesses a percentage of the total gross price of each

sale, regardless of whether the work has increased in value since its last sale. Just as a dealer is paid a commission on the sale of a painting regardless of whether the painting sells for a higher or lower price than the previous sale, so, too, the artist should be paid a resale royalty on resale, regardless of whether the artwork is sold at a profit. A resale royalty right structured in this manner is clear, practical and easy to administer.

The underlying rationale is that the resale royalty payable to the artist is the artist's share of the economic exploitation of his or her work. The French droit de suite is parallel to the royalty that a writer receives when the public makes use of his or her book. Other analogies include mechanical royalty payments to composers for sound recordings and rental royalty payments to the authors of sound recordings and computer software.

The resale royalty right should apply to all original works of visual art which are afforded moral rights protection under the Visual Artists Rights Act of 1990. These include: paintings, drawings, limited edition sculptures, limited edition prints and limited edition photographs. In addition, the resale royalty

right should extend to illustrated manuscripts and works of art in glass (not affixed to real property). The royalty right should not extend to jewelry and the work of architects, where the materials have value independent from the artist's work.

California, which is the only state which has enacted resale royalty legislation, provides the artist with a 5% resale royalty on gross resale proceeds. French law provides a royalty of 3%. The vast majority of countries that have adopted a collection system based on a percentage of sales price have fixed the rate at 5% of the proceeds from the sale of the work.(2) VLA believes that a resale royalty rate of 5% of gross resale proceeds would adequately protect the economic rights of artists, without unduly affecting the art market.(3)

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(2) Fawcett

(3) Another approach to be considered is that of "intrinsic value", or "valued added." The underlying rationale is that the increased value which is later recognized in a work has always been there and is due solely to the artist's creative labor. In order to compensate the artist adequately and to avoid unjust enrichment of the investor, the artist should share in the increased value. Countries which have adopted the value added approach vary widely on the percentage assessed, and generally have not been successful in implementing collection of resale royalties. Because of the complexities involved in this approach, VLA

For purposes of administration, it is advisable to have a threshold resale price before works will be subject to resale royalty provisions. Examples of existing thresholds (with resale royalties assessed against gross proceeds) follow:(4)

- (i) The California Resale Royalty Act - \$1,000
- (ii) The French droit de suite right - FF 100  
(approximately \$17)
- (iii) The German droit de suite right - DM 100  
(approximately \$60)

In their "droit de suite legislation harmonization project," the European Community provides for a minimum of \$250 EUA (about FF 1,500, or \$260).(5) VLA believes that \$750 is a reasonable threshold resale price. Payment of a resale royalty on works which sell for less than \$750 would impose an undue hardship on the administration of the resale royalty system without providing a sufficient benefit to the artist.

If resale royalties are paid on the gross sales price rather than on the increase in value, there

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believes such a system should not be adopted in the U.S.

(4) Fawcett

(5) Fawcett



is little reason to adjust for inflation; the resale royalty would also be paid in inflated dollars.(6)

The resale royalty right should apply to all resales and exchanges, whether at auction or through dealers, galleries or museums.(7) Although difficult to monitor, private resales should also be covered.

In order to encourage dealers to promote sales and help build an artist's reputation, a provision similar to the California provision exempting intra-dealer sales within the first ten years of the initial sale (Ca. Civ. Code §986(b)(7)) is worthy of serious consideration.

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?

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(6) If, however, the legislation were to provide resale royalties on added value, the depreciated value of the dollar at the time of resale should be factored in so that the true added value could be ascertained, which would complicate administration of the right. It should be noted that although the German droit de suite is based on the "intrinsic value" theory, in practice the resale royalty is a flat percentage of gross sales proceeds.

(7) However, dealer practices should be taken into account so that certain dealers and galleries are not penalized. If, for example, a dealer purchases a work from an artist rather than taking the work on consignment, the dealer's first sale should not be treated as a resale for purposes of resale royalties.

VLA believes that resale royalty legislation should be enacted to protect the American artist and to encourage and support art as a vital part of American culture. The resale royalty right should apply to visual artists who are either citizens or residents of the United States whose works are either (i) sold in the United States or (ii) sold outside of the United States by a seller who either resides in or is domiciled in the United States. The work need not have been created in the United States. Resale royalty rights should also be granted to those foreign visual artists whose countries provide reciprocal rights to American visual artists.

The French law extends droit de suite protection (i) to those foreigners whose countries give the reciprocal right to French artists and (ii) to foreign artists, although there is no reciprocity, who have participated in the life of French art and have been domiciled in France for at least five years (whether or not consecutive).

The California law protects an artist who, at the time of resale, is either a U.S. citizen or a resident of California who has resided in California for a minimum of two years, and applies only to sales

which take place in California or sales which take place out of California provided the seller resides in California.

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

For ease of administration and uniformity, VLA believes it would be fair for the duration of the resale royalty right to be coextensive with the copyright in the work. The Federal copyright duration under the Copyright Act of 1976 is the life of the author and fifty years after the author's death.

In France, the duration of the droit de suite is the life of the artist plus fifty years, which is the equivalent of the copyright duration. The California law creates the resale royalty right for the life of an artist and confers the right to the artist's heirs, legatees or personal representatives for an additional twenty years.

Although the right should be inalienable, except as discussed in Section 6 below, the right should be descendible in a manner analogous to copyrights.

VLA believes that the resale royalty right can and should be applied retroactively to works in existence at the date of enactment of legislation. Such a retroactive application would not unconstitutionally impair contracts or violate due process.(8) The public interest would be served by retroactive legislation by improving the welfare of artists who have already created works of art. Furthermore, given the volatility of the art market and the fact that art is generally purchased for its aesthetic qualities as well as for investment, it is unlikely that retroactive application of resale royalties would substantially disrupt the purchaser's expectations or would have altered the purchaser's decision to purchase the work of art. Retroactive application of the legislation would be consistent with the legislation's goal -- to encourage and support artistic endeavors as a vital

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(8) See Morseburg v. Balyon, 201 U.S.P.Q. (BNA) 518 (C.D. Cal., Mar. 23, 1978). (The Ninth Circuit upheld the constitutionality of the California Resale Royalties Act which retroactively applies the obligation to pay royalties pursuant to contracts executed before the effective date of the Act.); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). (The Supreme Court upheld a Federal statute against a Fifth Amendment challenge that the statute retroactively required employers to pay compensation to workers who contracted black lung disease, although no such compensation was required by contract.)

part of American culture.

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

VLA believes that it is essential to monitor and implement the collection of resale royalties through private artists' rights societies. These societies would play the same essential role in the art world as organizations such as A.S.C.A.P. and B.M.I. play in the music world. The French law is generally regarded as successful in large part because of existence of central private organizations, known as SPADEM and Adagp.(9) SPADEM and Adagp represent virtually all French artists, monitor most auction sales and collect royalties for their members.

In France, the private artists' societies entered into negotiations with The National Chamber of Auctioneers to establish rules for monitoring and collecting the droit de suite. In practice, every new membership in an artists' society is reported to The

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(9) J.E. McInerney III, California Resale Royalties Act: Private Sector Enforcement, 19 U. of S.F. Law Rev. 1,4 (1984-85).

National Chamber of Auctioneers, which then informs its members. The artists' societies currently receive all sales catalogues and trade journals which enable the societies to monitor resales. Monitoring of the rare uncatalogued sale is conducted by sworn agents present at the sale.

When a members' work is sold, the private society completes a "memorandum of account," which contains the name of the artist, the title of the work sold and the date of sale. The memorandum is then sent to the auctioneer, who completes the form by filling in the sales price and returns the form, along with the payment, to the artist's society.(10)

Galleries, auction houses and dealers in the United States generally maintain accurate records, so that a system similar to the French collection system could easily be implemented here. There are already artists' rights societies in existence in the U.S. In addition, new organizations could be formed which could assume the responsibilities of monitoring and collecting resale royalties. These private organizations should be compensated for their essential role in

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(10) Fawcett. A procedure still needs to be implemented in France for sales made through a dealer.



protecting the individual artist's rights by charging an administrative fee, to be paid directly from the resale royalties collected. The commissions charged by private collection societies generally do not exceed 15% of the resale royalties collected.(11)

VLA believes that the formation of private artists' societies to enforce the individual artist's rights will enable artists to have meaningful rights which would otherwise be hollow if the artists were required to monitor sales themselves. In addition, artists would be further empowered by the existence of a strong organization or organizations which would serve as a collective voice for artists who, individually, might not be heard.

To enable the private artists' rights societies to monitor sales of art works effectively, VLA believes that the legislation should contain a mandatory disclosure provision. The seller's failure to disclose sales information should be subject to a penalty -- perhaps three times the royalty owing (analogous to treble damages in antitrust actions).

Laws which do not contain a disclosure

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(11) Fawcett

obligation generally have not been successful. The German resale law, for example, originally did not require the public disclosure of the seller's identity, so that the artist had no effective way to monitor the resales of his or her art. However, subsequent legislation in 1972 granted the author, through a collecting society, the right to demand disclosure of the name and address of the seller as well as the sales price. (The auctioneer or dealer may still refuse to release this information by paying the droit de suite).(12)

Similarly, the California law does not require public disclosure of a sale. In an effort to address the enforcement problems inherent in the statute, the California law was amended in 1982. The statute, as amended, allows the artist to assign the right to collect his or her resale royalties to another individual or entity.

Artists must be able to make limited assign-

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(12) Legislation in 1983 has extended the German social security system to artists, requiring dealers to pay to social security 5% of the amounts they paid each year to living artists to cover the employer's share. Bild Kunst, the collection society which represents the majority of German artists, has entered into a contractual joint settlement with the art dealer organization requiring an annual lump-sum payment that covers the social security assessment and the droit de suite.  
Fawcett

ments (not waivers) of the right to collect and enforce their resale royalty rights to the private enforcement and collection agencies. The formation of private agencies to enforce collection should be able to overcome one of the primary weaknesses of the California Act -- that is, the inability or unwillingness of individual artists to bring suit to enforce their rights.

In keeping with the theory that an artist is being compensated with a resale royalty for the economic exploitation of his or her work, the artist should not receive a resale royalty if a work of art is presented as a gift. However, if a work of art is exchanged in a barter transaction, the artist should receive a resale royalty if the fair market value of the property received in exchange for the artwork exceeds the threshold amount.

6. Should the right be waivable or alienable?

The right should not be waivable or alienable (except for enforcement and collection purposes discussed in Section 5, infra), since the right is designed to confer benefits to the artist upon the economic exploitation of his or her work over a period of time. The artist is generally in a poor bargaining

position on the initial sale. If the resale right were waivable, VLA believes that artists would consistently be pressured into waiving the right, thereby rendering the legislation ineffective.

The artist should also be protected from subsequently transferring his or her future interests for an unfair price due to the generally poor bargaining stance of artists. In addition, if the right is not transferrable, it cannot be attached by creditors.

7. Should the California law be preempted in the event of a federal law?

In the event of the adoption of federal resale royalties legislation conferring benefits to the artist equal to or greater than those currently provided by the California law, the California law would no longer be needed. Accordingly, the California law should be preempted upon the enactment of federal resale royalty legislation.

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NOTE: Volunteer Lawyers for the Arts gratefully acknowledges the contribution of Debra R. Anisman, Esq., associated with the law firm of Davis Polk & Wardwell, New York, New York, in preparing this submission. These comments represent the viewpoint of Volunteer Lawyers for the Arts. They do not necessarily represent the position of any individual associated with that organization.

## Appendix

1. The Connecticut Volunteer Lawyers for the Arts is a program supported by The Connecticut Bar Association's Committee on Arts and the Law and The Connecticut Commission on the Arts. (Address: 227 Lawrence Street, Hartford, CT 07106)

2. The Connecticut Advocates for the Arts is a non-profit lobbying organization dedicated to enhancing support for artists and the arts.

3. Cleveland Volunteer Lawyers for the Arts is a section of the Cleveland Bar Association of Ohio that provides volunteer legal services to qualified artists and arts organizations as well as speakers on arts-related subjects. (Address: c/o Cleveland Bar Association, 113 St. Clair Avenue, Cleveland, OH 44114-1253)

4. Lawyers for the Creative Arts is a not-for-profit organization which provides free arts-related legal assistance and education to artists and art organizations throughout Illinois. (Address: 213 West Institute Place, Suite 411, Chicago, IL 60610)

5. Resources and Counseling for the Arts is a non-profit organization based in St. Paul, Minnesota. Its mission is to assist Upper Midwest independent artists and non-profit arts organizations by helping them gain access to materials and resources that will improve their professional and business management skills. (Address: 416 Landmark Center, 75 West 5th Street, St. Paul, MN 55102)

6. St. Louis Volunteer Lawyers and Accountants for the Arts offers free legal and accounting assistance to income-eligible artists and small arts organizations. It also offers related educational programs in art law and business. (Address: 3540 Washington, St. Louis, MO 63103)

7. Washington Area Lawyers for the Arts (WALA) is a non-profit organization providing free legal services for low-income artists and arts organizations in the greater Washington area. More than 250 attorneys volunteer through WALA to provide counsel for arts related legal matters to artists of all creative disciplines. (Address: 1325 G Street, N.W., Lower Level, Washington, D.C. 20005)





May 22, 1991

Office of the Register of Copyrights  
Copyright Office  
James Madison Building, Room 403  
First and Independence Avenue, SE  
Washington, DC 20559

Comment Letter

RM 91-1

No. 15

Dear Sir/Madam:

This letter is in response to the solicitation of comments on the feasibility of implementing a resale royalty, which appeared in the Federal Register, Feb. 1, 1991. I am Professor of Law at Golden Gate University School of Law and have worked on arts legislation for more than sixteen years. In that connection, I wrote the original drafts of the bill which became the California Art Preservation Act, California Civil Code §987. That statute, together with those of the ten states which subsequently enacted their own moral rights legislation, ultimately provided the working model for the Visual Artists Rights Act of 1990.

I also am a member of the Board of Directors of California Lawyers for the Arts, a California non-profit organization devoted to providing legal services and information to artists and art organizations since 1974. California Lawyers for the Arts has strongly supported the California Resale Royalty Act, California Civil Code §986, and endorses the enactment of federal legislation which would guarantee visual artists a right to share in the proceeds from resales of their works of art.

By vote of the Board of Directors, at our last board meeting, May 4, 1991, I have been authorized to submit these comments on behalf of California Lawyers for the Arts.

#### GENERAL COMMENTS

First, while clearly the enactment of some form of resale royalty right would be an important step in the right direction, more is needed to place visual artists on a level playing field with other "authors" under the Copyright Act. Precisely because visual art is understood to have its primary appeal in its unique, original form, the limited market for reproductions of even popular images seldom generates any significant revenue for their authors. And, of course, visual art cannot be "performed". Rather, it is through their display that works of visual art find their audience and are enjoyed. Ultimately, it is this display, the exhibition of visual art, which ought to provide their creators with a royalty. Consider, Note, "Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite," 76 Cornell L.Rev. 510 (1991).

And, precisely because not all art will be displayed publicly, the resale royalty can serve an important function by supplying both a quasi-public opportunity as well as a convenient measure for a royalty to be paid to the artist on the occasion of such works of art moving from one private display to another. See, Goetzl and Sutton, "Copyright and the Visual Artists Display

Right: A New Doctrinal Analysis", 9 Colum. J.L. & the Arts 15 (1984).

Second, it should be pointed out that criticisms of the resale royalty have invariably been founded on a false supposition of the goals of such legislation. By what ever name, the Droit de Suite, the art proceeds right, or the resale royalty, is not intended to serve as welfare for the starving artist. Indeed, nothing in the whole of the Copyright Act is so intended. On the contrary, the resale royalty is intended to provide an incentive to create by assuring appropriate rewards for successful creators.

Thus, visual artists deserve the opportunity to gain economically from the use of their intellectual property on a par with writers, composers, and all other "authors". Note, no one has been heard to object to copyright royalties (or patent royalties, for that matter) on the ground that, almost by definition, they are inevitably paid to the most successful and, hence, wealthy authors.

#### COMMENTS IN RESPONSE TO SPECIFIC QUESTIONS

1. Would resale royalty legislation promote or discourage the creation of new works of art and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

A resale royalty alone is unlikely either to promote or to discourage the creation of new works of art. Although, to some

extent, it could be argued that its promise of future rewards might stimulate some artists to sell works early in their careers at lower prices than they might otherwise hope to receive, most likely the impact of a resale royalty would be de minimis. There is certainly no reason why the promise of a share of future value would deter any artist from creating new art works.

With respect to the effect such a resale royalty might have upon the marketplace for works, two issues are raised. First, it was argued in connection with the California Resale Royalty Act (California Civil Code §986) that imposing a resale royalty in one state would incline the market to leave that state. No evidence whatsoever has been adduced to support that. The art market in California seems to be thriving. A five percent royalty is not likely to affect a seller's choice of venue where that seller is already looking at auction commissions of twenty percent and upwards. That seller will look for the market where the demand for the particular artist's work is greatest.

Similarly, a prospective buyer of art is not likely to be much influenced in deciding upon an art purchase by the possibility that a resale of that work may require payment of a small royalty. Since such a small proportion of art works actually appreciate in value, the rational collector-investor is grateful for any increase. Note that when the major auction houses imposed an additional ten percent buyers premium, hardly a murmur of objection was heard from collectors.

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured: by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

If a resale royalty right were to be implemented, it might take a variety of forms. Ideally, it would form part of a comprehensive display right. See, Goetzl and Sutton, Supra. However, at a minimum, it should apply to paintings, drawings, and other unique works of art including collages, assemblages, sculptures and monoprints. It could also be more broadly applied to sculptures, prints, and fine art photographs produced in limited edition multiples.

In theory, it could be asserted that a resale royalty should apply to any resale. Nevertheless, in response to obvious practical considerations, it is recommended that resales below a threshold dollar amount, perhaps as high as \$2,000, should be exempt. While some nations with a resale royalty assess a larger percent against only the appreciation in value, California applies a smaller percent (5%) against the entire resale proceeds. Although, California requires the resale price to exceed the price previously paid by the seller before a resale royalty becomes due, it is recommended that a five percent royalty be due whether the resale price exceeds the seller's purchase price or not. Not only would this formula make it far

easier to determine when a royalty is due, but it would also acknowledge that the mere fact there is any interest at all in a new display of the work of art, that is, a resale market, is a credit to the artist. In fact, whenever a work of art is resold, that work of art is simply moving from display to one group of people to a new display before another circle of viewers.

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?

While it is tempting to confine the benefit from such a resale royalty to United States citizens, it would be fairer to extend its benefits to U.S. citizens wherever they may be living and to aliens who have been residents of the United States for, perhaps, two years. See, e.g., California Civil Code §986(c)(1). Perhaps, sometime in the future, the benefit of the resale royalty could be extended to artists who are citizens of other nations in exchange for reciprocal rights in those countries being extended to our citizens under their laws.

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should it be descendible? Should or can the right to be applied retroactively to works in existence at the date of enactment of any legislation?

There is no reason why the term of any resale requirement should not be coextensive with the duration of copyright.



Certainly, any right to royalties should become an asset of a deceased artist's estate. It is in the years after artists' deaths that the needs of their descendants are likely to be the greatest. That is also the time most likely to witness an appreciation in prices for those artists' works since no more can ever be created.

The resale royalty can be and should be made to apply to any prospective resales of works of art irrespective of when they were created or first sold. This will not deprive any collector of property without due process of law. See, Morsburg vs. Balyon, 621 F.2d 972 (9th Cir. 1980) cert. denied, 449 U.S. 983 (1980). There can be no vested property right in a rule of law. See also, In re Catherwood's Trust, 405 Pa. 61, 173 A.2d 86 (1961).

5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?

The California Resale Royalty Act essentially leaves it to artists to enforce their rights to a royalty. This requires artists to keep abreast of sales of their works, a formidable task, made more difficult by the widespread reluctance of galleries to disclose to artists the identity of the collectors who bought their works. There is no systematic way for an artist to learn of a particular resale. By granting artists the right

to recover attorneys' fees, some additional incentive is offered them to monitor such resales and enforce their rights.

Another deterrent to the enforcement of the resale royalty right in the California experience has been artists' persistent fear of retribution by galleries when artists would be so bold as to seek to enforce their rights. Although this fear may not often be justified, it has proved difficult to overcome for too many artists.

Perhaps the most effective enforcement mechanism would be the formation of a private society modeled after the American Society of Composers, Authors, and Publishers or Broadcast Music, Inc. In such a case, an artist would transfer his or her rights to receive any resale royalties to that society, which would then undertake to monitor resales, collect royalties due, and then distribute such proceeds, after a modest deduction to cover its operating costs, to the artist.

6. Should the right be waivable or alienable?

This right to a resale royalty must be made non-waivable. Were it otherwise, artists would inevitably be compelled by the marketplace to waive these rights. When California amended its Resale Royalty Act in 1982, this precise question was addressed again with the result that the right remains non-waivable although a transfer for the purpose of collection (see paragraph 5 above) is now authorized. Note, artists are free to refrain

from enforcing their rights after such rights have accrued. However, artists should not be placed in a position where they can be pressured to relinquish these rights in advance.

7. Should the California law be preempted in the event of a federal law?

If a resale royalty right would become part of federal law, presumably through amendment to the Copyright Act, the California Resale Royalty Act should be preempted. However, to the extent that such a federal right provided less protection to artists than the California law, I would hope that the California statute would survive. That is, states should be free to choose to provide artists with greater protection than the minimum provided by federal law.

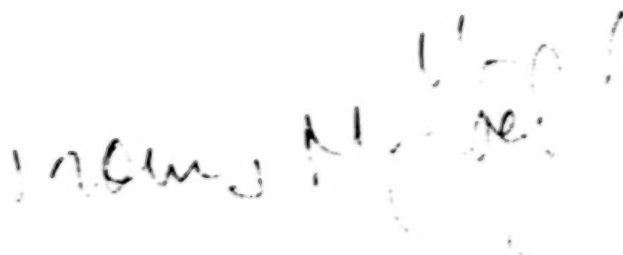
#### CONCLUSION

I am attaching herewith copies of (1) Goetzl and Sutton, "Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis", 9 Colum. J.L. & Arts 15 (1984), (2) H.R. 4366 (99th Congress, and (3) Goetzl, "The Kennedy Proposal to Amend the Copyright Law: In Support of the Resale Royalty" 7 Cardozo A & E L J 249 (1989). As explained in these articles, the resale royalty is not intended as a subsidy for impecunious artists. For its opponents to argue that a resale royalty only benefits successful artists misses the point. On the contrary, the resale royalty is conceived to provide a measure of parity for the creators of visual art vis-a-vis authors of other copyrightable

works who derive continuing economic reward from the sale of copies or the performance of their works.

On behalf of California Lawyers for the Arts, I urge that the Copyright Office recommend to the Congress that some form of resale royalty right be provided to visual artists. If I can be of any further service, please advise me. I shall be happy to assist in any way I can.

Sincerely,



Thomas M. Goetzl  
Professor of Law  
Member, Board of Directors of the  
California Lawyers for the Arts

TMG:thk

Attachments: Goetzl and Sutton, "Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis"; H.R. 4366; Goetzl, "The Kennedy Proposal to Amend the Copyright Law: In Support of the Resale Royalty"

cc: Alma Robinson, Executive Director, California Lawyers for the Arts

Catherine Auth, Executive Director, National Artists Equity Association, Inc.

# ART & THE LAW

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<i>Thomas M. Goetzl</i>	
<i>and Stuart A. Sutton</i>	

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# Copyright and The Visual Artist's Display Right: A New Doctrinal Analysis

By THOMAS M. GOETZL and  
STUART A. SUTTON\*

## I. INTRODUCTION

Under Article I, section 8, clause 8 of the United States Constitution, Congress is granted the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>1</sup> Following the traditions of our English copyright heritage, Congress tailored the statutory law of copyright to function in a free enterprise system.<sup>2</sup> By granting an author<sup>3</sup> the exclusive right<sup>4</sup> to control disclosure<sup>5</sup> and certain uses<sup>6</sup> of his or her creations, the author

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\* Thomas M. Goetzl, Professor of Law, Golden Gate University School of Law; A.B. 1965 U. of California, Berkeley; J.D. 1969 U. of California, Berkeley, Boalt Hall. Professor Goetzl worked closely with California State Senator Allan Sieroty on drafting the California Art Preservation Acts (Civil Code §§ 987 and 989) and on drafting the recent amendment to California Resale Royalty Act (Civil Code § 986). Stuart A. Sutton, J.D. 1981 Golden Gate University School of Law; LL.M. 1982 U. of California, Berkeley, Boalt Hall.

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1. U.S. Const. art. I, § 8 cl. 8.

2. For a discussion of our reliance on English tradition and precedents, see *infra* text accompanying notes 24-57.

3. The term "author" will be used throughout this article in its constitutional sense meaning all creators of intellectual property which fall within the subject matter of copyright; the term "artist" will be used to denote visual artists—a sub-category of authors.

4. While the constitutional mandate speaks in terms of exclusive rights, the rights granted by statute have never been "exclusive" in the usual sense of the word. As a result of the "fair use" doctrine and through compulsory licensing of certain classes of copyrighted works, the author does not have "exclusive" control over even those uses of a work that fall within the ambit of statutory rights.

5. The right of "first divulcation" is the most important right provided the author under federal law. Justice Brandeis noted that the question of whether or not a creation of the intellect will be disclosed to the public by its author is deeply rooted in the right of privacy "as a part of the more general right of immunity of the person." S. Warren & L. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 205 (1890-91). As such, an author's creation forms an intrinsic part of what Justice Brandeis termed the "inviolable personality." The core of the pivotal right of first divulcation stems from the society's moral obligation to protect what is nothing less than an extension of the author's personality. Thus, while statutory control of the right of first divulcation provides the author with needed leverage in the market place, the right has an even more important role as a cultural moral imperative.

6. Just as control over any specific use may not be exclusive as a result of "fair use" and compulsory licensing, the constitutional mandate has never been interpreted to include exclusive



is provided with bargaining leverage when he or she deals with the enterprises that bring the work to the public. By enhancing the artist's bargaining power, the law of copyright promotes the author's well-being, and, ultimately, the public welfare.<sup>7</sup> Thus, giving the author control over specific events of economic value that he or she would otherwise lack the ability to control renders those events compensable and, presumably, encourages the creation of new works.

Under this marketplace model, copyright law has failed to provide most visual artists with economic incentives equal to those of artists working in the literary and performing arts.<sup>8</sup> Few visual artists bother to copyright their creations.<sup>9</sup> Instead, they benefit only from the initial sale of a single copy.

Most works of visual art cannot be exploited financially under existing American copyright law as effectively as works capable of performance or multiple reproduction. In order to correct this inequity, the artist's right to control the use of the expression embodied in his or her tangible works must be accepted and the visual artist granted both public and private rights of display.

Recognition of new exclusive rights in the use of the expression embodied in the tangible object is not unknown to American copyright law. The public performance of a work of dramatic literature has been a compensable event for the playwright under United States copyright law since 1856.<sup>10</sup> Similarly, composers have enjoyed the economic benefits of controlling the public performance of music since 1897.<sup>11</sup> These grants of rights in public performance result from congressional recognition of the artist's right to exploit economically

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control over all uses of a creative work. The law of copyright has been defined from its very beginning as a "bundle of rights" that grant the author control over an enumerated list of uses that the law wishes to render compensable; e.g., while the copying of a protected work for economic gain by an owner of a copy has been turned into a compensable event, the public display of that same work has not been made compensable under copyright.

7. It has been said that copyright's role in benefiting the author is secondary to its role in benefiting the public. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 78 L. Ed. 574, 104 S. Ct. 774 (1984).

8. See *infra* text accompanying notes 41-57.

9. See generally Sheehan, *Why Don't Fine Artists Use Statutory Copyright?*, 22 *Bull. Copyright Soc'y* 242 (1974-75). While the artist may retain all rights under copyright upon sale of the material object, 17 U.S.C. § 202 (1982), the right to reproduce copies is not very valuable without a statutory right of access to the work after it is sold. Millinger, *Copyright and the Fine Artist*, 48 *Geo. Wash. L. Rev.* 354, 363 (1980). Additionally, such rights can be rendered valueless through the right of an owner of a copy (even a unique original) to destroy that work at will—destroying rights in copyright as well. See *infra* text accompanying notes 18-23 for a brief discussion of an author's moral rights in the United States.

10. Act of Aug. 18, 1856, ch. 109, 11 Stat. 136 (1856).

11. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897).

the aesthetic use of the expression embodied in a work even in the absence of multiple reproduction and vending of copies to the public.<sup>12</sup>

Even though works of dramatic literature were capable of reproduction in multiple copies in the same manner as the novel, the economic gain to be received from the right to control the printing and vending of the work was minimal when compared to the gain derived from controlling public performance.<sup>13</sup> In order to avoid the inequity of limiting the author to an inappropriate measure while others freely exploited public performance, the playwright was granted the right to control the reproduction, vending and aesthetic use of the expression embodied in the copy.

The visual artist today faces problems similar to but more pronounced than those which historically faced the playwright. Yet Congress has failed to respond to the artist's plight by extending him or her an effective right to control the public, aesthetic use of the expression embodied in his or her works: a right of public display. The 1976 Copyright Act granted the visual artist a right of public display for the first time.<sup>14</sup> However, that right is exhausted upon the first sale of the copy.<sup>15</sup> It is an empty right for the visual artist. The artist, like any other property owner, already controlled public display of his work prior to sale as a part of the traditional incidents of property ownership. This incident of property ownership, like the right granted under the 1976 Copyright Act, also ceased upon sale of the copy. If the new grant of a public display right is to provide the visual artist with financial reward, it must create a right of public display which extends beyond the first sale. Such an extension should be structured as a compulsory license thus allowing the owner of the art work to exercise his or her traditional right of control over the copy and at the same time grant the artist a right to exploit his or her art work.

Furthermore, the visual artist should be granted a right of private display under federal copyright law. The right of private display would compensate the artist for the aesthetic use and enjoyment of his art work by the owner's family and acquaintances. While a right of private display would be new to the law of copyright, it is by no means new to the economic exploitation of intellectual property. Private display has played a major economic role where a copyright proprietor has had the bargaining strength in negotiations but lacked

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12. See *infra* text accompanying notes 41-50.

13. See *infra* text accompanying notes 52-57.

14. 17 U.S.C. § 106(5) (1982).

15. *Id.* § 109(b).

a statutory private display right.<sup>16</sup> As suggested for the right of public display, the interests of the private owner of the copy and the visual artist would be best accommodated through the use of a compulsory license.

The fact that private display exists in the marketplace but not under federal copyright is not to say that it lacks statutory precedent either here or abroad. Such a right of private display presently exists (in rudimentary form) in the European and California *droit de suite*—what is known in France as a “follow up right” and in this country as a resale royalty.<sup>17</sup>

In order to establish firmly a comprehensive doctrinal basis for these new rights, it is necessary to trace their historic roots. Such an historical excursion is more than an academic indulgence. In the four centuries of its development copyright law has been structured around two distinct models. Failure to recognize this has resulted in confusion in the academic literature which criticises the *droit de suite* and the doctrinal inconsistencies of the new federal right of public display.

The first model of Anglo-American law will be referred to as the Gutenberg Model. Its primary referent is the printing press (and analogous technologies). The purpose of the Gutenberg Model was to render compensable the printing and vending of aesthetically equivalent copies. The second model, the Follow Up Model, is completely divorced from the economics of the vending of copies, and instead protects the use of the expression embodied in the work. It renders display and performance compensable.

Distinct collateral bodies of law have evolved for each model as a result of the differing requirements, functions, and policy considerations of the two models. When these collateral principles are removed from the context of one model and are applied to the other model, disastrous consequences result. The most unfortunate results in light of the present thesis are:

- (1) The application of the exhaustion principle developed under the Gutenberg Model to the new federal right of public display (a right doctrinally consistent with the Follow Up Model) resulting in a right that serves little or no economic function at all for the visual artist; and
- (2) Failure to recognize that the compensable event of the *droit de suite* is the private display of a work of visual art (a function of the Follow Up Model) and not the resale of the copy (a function of the Gutenberg Model) resulting in the assertion by opponents

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16. See *infra* text accompanying notes 142-44.

17. See *infra* note 51.

that the exhaustion principle forecloses such a right under federal law.

The following is a brief summary of *droit moral* and *droit de suite*, followed by an overview of the historical development of the Gutenberg and Follow-Up Models, their functions and collateral bodies of law. Many civil law countries of Europe recognize the artist's *droit moral*. Usually classified as a right of personality, moral rights are entirely distinct from patrimonial or property rights.

Copyright, for example, which is available to artists in civil law countries as well as in the United States and other common law countries, is a patrimonial or property right which protects the artist's pecuniary interest in the work of art. The moral right, on the contrary, is one of a small group of rights intended to recognize and protect the individual's personality. Rights of personality include the rights to one's identity, to a name, to one's reputation, one's occupation or profession, to the integrity of one's person, and to privacy.<sup>18</sup>

In countries which have embraced the artist's *droit moral*, economic rights under copyright function as an adjunct of the artist's broader moral right to control the use of what is in essence an extension of his or her personality.<sup>19</sup> The artist's economic rights, in those nations which recognize the moral obligation of society to the creator of intellectual property, arise out of his or her right to control the use of the expression embodied in the art work he or she has created. The

18. Merryman, *The Refrigerator of Bernard Buffet*, 27 *Hastings L.J.* 1023, 1025 (1976).

19. *Id.* See also, Brandeis, *supra* note 5. While United States copyright law has focused on the author's right to control a limited bundle of uses, it has failed directly to address the equally significant area of the author's need to have protection against the misuse of the work. With the exception of minimal protections in limited contexts, see, e.g., *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976), an author's moral right to protect the integrity of a work after its alienation has not been recognized in the United States. *Id.* at 24; see also *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). Thus, an owner of a copy of a work of visual art may distort, mutilate and even destroy the work at will—*jus utendi et abutendi*. Cf. Cal. Civ. Code § 987 (West Supp. 1983) (California Art Preservation Act makes actionable the defacement, mutilation, alteration, or destruction of a work of fine art).

This American (and English) reluctance to embrace the principle that artists' rights in their creations stem from the fact that those works are an inalienable aspect of the artists' personalities is most likely the result of the singular Lockean focus, under both statute and common-law, on copyright as a form of intellectual property. Although France and Germany have not escaped John Locke's conception of property as a result of labor in their copyright laws, they have tempered its influence to varying degrees with the Kantian perception of artistic creations as part of the artist's personality. F. Case, *Copyright Thought In Continental Europe: Its Development, Legal Theories and Philosophy—A Selected and Annotated Bibliography* 12 (1967).

Just as the right of first divulgence is rooted in that branch of the right of privacy granting protection from intrusion into the private aspects of one's life, see Brandeis *supra* note 5, the author's right to protect the integrity of the work after dedication to the public stems from the second branch of the right of privacy—the right not to have one's personality placed in a false



artist's moral right takes precedence over property interests of the art object's owner. In countries which observe the artist's moral right, the owner of a work of art may not alter it or in any way demean the work's integrity.<sup>20</sup> Similarly, under the principle of the *droit de suite*, the artist retains an interest in the work even after its sale and receives compensation on resale for the "new use" of the work whether by private parties or the general public.<sup>21</sup>

Courts in America have consistently refused to accept the principle of an artist's moral rights in his or her creations.<sup>22</sup> As a result of the rejection of this basic principle, the United States has experienced a rudderless development of moral rights law. Such development has been shaped only by the prevailing economic realities of the marketplace, the developing technologies of reproduction of multiple copies,<sup>23</sup> and vague perceptions of the public good.

The failure to perceive the distinctiveness of the public and private rights of display has allowed opponents of the *droit de suite* to assert that the exhaustion principle forecloses such a right under federal law.

## II. THE HISTORICAL DEVELOPMENT OF THE GUTENBERG AND FOLLOW UP MODELS OF COPYRIGHT LAW

Traditional scholarship has viewed copyright as a balancing of the tension between the author's property interest and the public's right of

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light through the distortion of one's artistic creations. See Prosser, *Privacy*, 48 Cal. L. Rev. 383, 398-401 (1960).

The French moral rights protect only against the mutilation or alteration of a work and not against its destruction since only an existing work that has been distorted is capable of placing the author's reputation in a false light. *LaCasse et Welcome c. Abbe Quenard*, 1934 D. Jur. 385, [1934] Gaz. Pal. II165 (Cour d'Appel, Paris). The California Art Preservation Act, Cal. Civ. Code § 987 (West Supp. 1983), prevents destruction as well as distortion of a work of fine art. Section (a) of the Act reveals, however, that the right is based not only on the traditional concept of protecting the artist's reputation (Prosser's second branch of the right of privacy) but also on the declaration that there is "a public interest in preserving the integrity of cultural and artistic creations." This public interest, independent of the artist's reputation, would justify a cause of action for the destruction of the work. Thus, while mutilation invades the privacy interest of the artist, destruction invades the society's right to have its culture and heritage protected. Under the new Cal. Civ. Code § 989, a cause of action may now be brought by select organizations on behalf of the public in California for the destruction of a work of art.

Representative Barney Frank of Massachusetts has introduced a moral rights bill in the United States House of Representatives. See H.R. 1521, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,216.

20. See, e.g., *Buffet v. Fersing*, 1962 Recueil Dalloz [D. Jur.] 570 (Cour d'Appel, Paris).

21. For a general discussion of the *droit de suite*, see the secondary materials cited *infra* note 82.

22. *Granz v. Harris*, 198 F.2d 585, 588-89 (2d Cir. 1952); *Gilliam v. Am. Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976); See generally 2 Nimmer on Copyright § 8.21 [A] (1982).

23. See *infra* text accompanying notes 24-31.

access. This view is adequate when analyzing "fair use"<sup>24</sup> and the "idea/expression dichotomy,"<sup>25</sup> but proves unsatisfactory when attempting to reconcile an intrinsic sense that the author's property or other interest flows from the act of creation with a legal and political commitment to the free flow of ideas and a professed distaste for monopolies of any sort.

Much of the inability to affect the reconciliation stems from the failure to recognize that the history of copyright has been shaped not by two but by three interests: those of the author, the publisher, and the public.<sup>26</sup> Our perceptions of the equities and dangers of copyright monopoly shift depending upon whose interest is being examined. It is impossible to do justice to the author under copyright when the hidden source of our response might well be shaped by the problems presented by the publisher's interest and the common-law and statutory rules that have evolved to meet those considerations.

#### A. *The Gutenberg Model: The Publisher's Right to Reproduce and Vend*

##### 1. The Nature of Copyright Under the Gutenberg Model

From its formal inception under the charter of the Stationers' Company in 1557<sup>27</sup> until 1856 in the United States, when Congress granted

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24. For the statutory embodiment of "fair use", see 17 U.S.C. § 107 (1982).

25. 17 U.S.C. § 102(b) states:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or embodied in such work.

26. Particular focus has been brought to the nature and the historical consequences of the relationship among these interests by Professor Lyman Patterson in his book, *Copyright In Historical Perspective* (1968).

27. "Copyright appears to have been first recognized as a species of private property in England in 1556." Warren & Brandeis, *supra* note 5, at 195 n.1. For a comprehensive history of the Stationers' Company, see C. Blagden, *The Stationers' Company: A History, 1403-1959* (1960); Patterson, *supra* note 26, at 1-179; A. Pollard, *Shakespeare's Fight With the Pirates and the Problems of the Transmission of His Text*, 1-25 (2d ed. 1920).

The incorporation of the Stationers' Company, while beginning the formal history, did not mark the first actual use of copyright in England. Richard Pynson was granted the first printing "privilege" by the Crown in 1516. R. Bowker, *Copyright: Its History and Its Law*, 19 (1912). "[F]rom 1516 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of stated kinds." B. Kaplan, *An Unhurried View of Copyright*, 3 (1967).



playwrights a right of public performance,<sup>28</sup> the nature of copyright was exclusively a publisher's right to print and vend.

It was originally designed as a mechanism for the stabilization of the English book trade and remained a statutory scheme for regulating unfair competition between competitors in the printing and vending of copies.<sup>29</sup> The basic thrust of copyright through its first three centuries was to guard against misappropriation of the publisher's interest in the "copy"—an interest resulting from the publisher's investment in the purchase of the author's manuscript and its preparation for reproduction on the press.

Even after copyright was first recognized as an author's right in 1710,<sup>30</sup> the *character* of the right remained unchanged. The author, like the publisher, was granted nothing more than the right to print and vend the copy.

The major force in the expansion of protections under the Gutenberg Model was an advancing technology that increased the classes of subject matter appropriately within the ambit of the Model. The evolution of photographic and photomechanical processes in the latter half of the nineteenth century as well as the development of sound and video recording technologies in the twentieth century have made application of the model more difficult.<sup>31</sup> Nevertheless these techno-

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28. In 1856 Congress granted performance protection to dramatic works in the Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).

29. See generally, Patterson, *supra* note 26.

30. 8 Anne, c. 19 (1710). It was not until the second half of the eighteenth century that the House of Lords established the doctrine "that authors had always possessed a natural right to the fruits of their labor." A. Pollard, *supra* note 27, at 4; see *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769); *Forrester v. Waller*, 4 Burr. 2331, 98 Eng. Rep. 216 (1741); *Pope v. Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (1741). It was to be several centuries before the conception of an author's personal, inchoate rights began to evolve into *les droits moreaux* in the European civil law countries.

31. The difficulties presented under the Gutenberg Model by technological evolution is best illustrated by examining *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908). The Supreme Court held in *White-Smith* that the manufacture of songs on player piano rolls did not constitute copies within the meaning of the copyright laws because the music was not eye readable. Even though Congress quickly rectified the basic inequity presented in *White-Smith* by giving the author the right to control the incident of mechanical recording in the 1909 revision, Rev. Stat. ch. 320, 35 Stat. 1075 (1909), it did not say that a reproduction can be a copy even though not eye readable. As a result, the Court's Gutenbergian definition of a copy remained to plague the courts until the 1976 revision. The problems were most pronounced in the broadcast and recording industries where phonograph records, videotape, and fixed radio broadcasts could not qualify for copyright protection because they were not eye readable and therefore not acceptable for registration. B. Kaplan & R. Brown, *Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Work* 10-11 (3d ed. 1978). Protec-

logical changes have not appreciably altered the basic nature of the Gutenberg Model as a publisher's right aimed at preventing the copyrighted work's misappropriation by a competitor in the manufacture and vending of copies.

## 2. The Scope of Rights Under the Gutenberg Model

The scope of the right to print and vend under the Gutenberg Model was shaped by the market interest of the publisher. That interest extended no further than the vending of aesthetically equivalent copies of the author's underlying work. Thus the Model offered limited rights and protections. For example, for more than the first three centuries of the Model's history, an alteration of the form of the work either through abridgment or translation into another language was not considered an infringement of copyright<sup>32</sup> because such a use did not jeopardize the publisher's interest in the sale of copies printed unabridged or in the original language. Protection of the publisher from unfair competition did not require granting rights in the content of the work but only in its specific form.<sup>33</sup>

Furthermore, since the function of the right was to protect the vending of the publisher's printed copies from unfair competition by a

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tion was gradually extended to these new uses of the author's expression, e.g., protection was extended to sound recordings in the Sound Recording Amendment of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. Congress effectively overruled *White-Smith* in the 1976 revision by defining copies as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1982).

32. For a brief discussion of early English cases that refused to extend protection to abridgments and translations, see Comment, *Derivative Works and the Protection of Ideas*, 14 Geo. L. Rev. 794, 796 (1980); see also Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 Vand. L. Rev. 1161, 1188 (1975).

33. "In deciding infringement cases, the arrangement of words on a page was of more importance to courts than the meaning of the words. A change in the form thus produced a different work even though the content was substantially the same." Comment *supra* note 26, at 796. This basic tenet of the Gutenberg Model is aptly illustrated by the words of Justice Aston in *Millar v. Taylor*, *supra* note 24, 4 Burr. at 2348, 98 Eng. Rep. at 226:

. . . I am of the opinion that the publication of a composition does not give away the property in the words; but the right of copy still remains in the author; and that no more passes to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments; but he buys no right to publish the *identical* work. (emphasis added). See also 4 Burr. at 2310, 98 Eng. Rep. 205 (remarks of Justice Willes). Thus abridgments and translations of a copyrighted work did not constitute infringement, the publisher (and later the author) was protected only from direct piracy.

competitor, the printing (copying) of a work was not originally considered an infringement absent a vending.<sup>34</sup> Private copying for private use was not actionable prior to 1909 unless that copy entered commerce through a vending.<sup>35</sup>

Finally, since the publisher's copyright interest in a particular copy was secured through the protection of its sale, his interest in that specific copy naturally terminated with its vending. After the sale, the purchaser of the copy was free to use the copy as he or she pleased, destroying it at will, selling it, or, (prior to 1909) copying it for his or her private use.<sup>36</sup> Control over the vending of the work past its first sale could not be justified under a law rooted in misappropriation. Such extended control would protect a copyright owner from much more than the danger of unfair competition and would infringe economic freedoms too greatly.

Exhausting the publisher's interest in the vending of a particular copy with its first sale guaranteed that the right would not conflict with the copy purchaser's traditional incidents of property ownership. Had the publisher's interest not terminated, it would have been impossible to reconcile coextensive rights to vend the copy in both the publisher and the owner of the copy. As Professor Nimmer has stated, "[A]t this point the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation."<sup>37</sup>

The first sale doctrine (the exhaustion principle), as shaped by the publisher's interest under the Gutenberg Model, was judicially incorporated into federal copyright by the United States Supreme Court in 1908.<sup>38</sup> The Copyright Act of 1909 statutorily integrated the exhaus-

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34. Patterson, *supra* note 32, at 1187-88.

35. *Id.* The writers do not intend to imply that since 1909 copying without a vending is necessarily actionable. See *Sony Corp. of Am. v. Universal City Studios*, (U.S.) 78 L. Ed. 574, 104 S. Ct. 774; reh'g denied 80 L. Ed. 2d 148, 104 S. Ct. 1619 (1984).

36. *Id.*

37. 2 Nimmer on Copyright § 8.12[A] (1980).

38. The lower federal courts had ruled on the right of a copyright proprietor to control the resale of a work that had passed out of his or her possession as early as 1894. See, e.g., *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894); *Henry Bill Publishing Co. v. Smythe*, 27 F. 914 (C.A.S.D. Ohio 1886). The issue was not addressed by the Supreme Court until *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339 (1908).

In *Bobbs-Merrill*, the copyright proprietors (Bobbs-Merrill) had printed the following legend on the title page of the novel *The Castaway*: "The price of this book at retail is one dollar net. No dealer is licensed to sell at a less [sic] price, and a sale at a less [sic] price will be treated as an infringement of the copyright." *Id.* at 341. Bobbs-Merrill argued that the copyright proprietor,

tion principle as an appropriate restriction on the right to vend.<sup>39</sup> Section 109(a) of the 1976 copyright revision continues this restriction.<sup>40</sup>

## B. *The Follow Up Model: Evolution of Rights in Performance and Display*

### 1. Failure of the Gutenberg Model

From its very inception, the Gutenberg Model ill-served the theatrical and visual arts. The Model's focus on the compensable event as the

in strict analogy to the rights of a patentee, had the right to control the retail price of the copies that had been sold to a retailer under the author's right to "vend" granted by Section 4952 of the Act of 1873.

Rejecting the *Bobbs-Merrill* patent analogy due to the inherent difficulty in applying patent precedents to copyright issues, the Court construed the statute as exhausting the author's right to vend a specific copy upon its first sale. *Id.* at 349-51. The Court did not preclude the copyright proprietor's right to secure such a restriction under contract. *Id.* at 350.

39. In the congressional hearings on the 1909 revision of the Copyright Act, the basic issue of *Bobbs-Merrill* was a matter of great concern to librarians and the second hand book sellers. Early legislative proposals did not expressly embody the Supreme Court's *Bobbs-Merrill* limitation. See, e.g., Bills to Amend and Consolidate the Acts Respecting Copyright: Arguments Before the Committee on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19653, 59th Cong., 2d Sess. 16 (1906). Thus, there was concern that the new legislation would be interpreted as granting the author a total right to control the disposition of copies as they occurred seriatim. The opponents feared that such a grant would give the author the power to prevent extending library lending rights and to prevent second hand sales. See, e.g., *id.* at 68-69 (statement of H.C. Wellman); *id.* at 75-77 (statement of William C. Cutter); *id.* at 85 (memorandum of R.R. Bowker); *id.* at 90-91 (statement of Robert U. Johnson); *id.* at 114 (statement of H.N. Low); *id.* at 148 (statement of Ansley Wilcox); *id.* at 158-60 (statement of Arthur Steuart); *id.* at 190-91 (statement of George H. Putnam); *id.* at 404 (memorandum of the Committee on Copyright and Trademark of the Association of the Bar of the City of New York).

The fears of the librarians and book sellers were allayed by the addition to the Act of 1909 of the clause that "nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075 (1909). The lower federal courts have adhered to the holding of *Bobbs-Merrill* thus firmly establishing the "first sale doctrine." See, e.g., *United States v. Atherton*, 561 F.2d 747, 750 (9th Cir. 1977); cf. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980), discussed *infra* at note 141. It has come to be viewed as an adjunct to the common-law aversion to restraints on alienation. 1 *Nimmer on Copyright* § 103.3 (1976); see, e.g., *C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 191 (N.D. Tex. 1973); *Blazon v. Delux Game Corp.*, 268 F. Supp. 416, 434 (1965).

40. 17 U.S.C. § 109(a) (1982). For a general discussion of the first sale doctrine, see 2 *Nimmer on Copyright*, § 8.12 (1982); N. Boorstyn, *Copyright Law* § 4.4 (1981); see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 79-80, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5693-94 [hereinafter cited as House Report].

The scope of the exhaustion principle embodied in § 27 of the Act of 1909 was not expanded in § 109(a) of the Act of 1976. According to the House Report, "[s]ection 109(a) restates and confirms the principle" as established under § 27 of the Act of 1909, and states that "the outright

vending of numerous aesthetically equivalent copies, while particularly suited to the literary arts, (and to a lesser extent the musical arts) proved either useless or of minimal value to those art forms whose economic potential lay in performance, or display or which adapt poorly to multiple reproduction.

### *The Theatrical Arts*

When a sixteenth century English playwright wrote a play, it was generally purchased outright by an acting company and became its exclusive property.<sup>41</sup> Publication of the play in multiple copies for distribution to the public was considered "bad box office" by the companies and therefore an event to be avoided unless the players were in financial distress.<sup>42</sup> Therefore, while the acting companies frequently registered their plays with the Stationers' Company, it was not to enable them to vend copies but rather to prevent others from obtaining and distributing pirated publications that would adversely affect ticket sales.<sup>43</sup>

sales of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition." House Report at 79. This last phrase should not be read as an expansion of the meaning of § 27 or § 109(a) past the parameters of *Bobbs-Merrill* to which it refers.

41. H. Gibson, *The Shakespeare Claimants* 265 (1962). A playwright could expect to be paid approximately six pounds for the manuscript of a new play. M. Marchette, *Shakespeare of London* 118 (1949).

42. G. Harrison, *Introduction to Shakespeare* 205-06 (1939). This is not to imply that the acting companies were totally indifferent to the money to be earned from the sale of a manuscript to a printer. In fact, Alfred Pollard suggests that such a sale might have been one way of recouping the initial cost of the manuscript. A. Pollard, *supra* note 27, at 36-37. Even though there is surely some validity to Pollard's observation, it must be tempered by the fact that only fourteen plays from the entire Shakespeare canon were published during Shakespeare's lifetime. Harrison, at 193.

43. In addition to registering a work with the Stationer's Company to prevent piratical publications, the acting companies were also able to appeal to the aid of their patrons. Pollard, *supra* note 27, at 35. The same political and religious strife that prompted Crown censorship and the chartering of the Stationer's Company resulted in the censoring and control of the acting companies and the playwrights.

Elizabeth dealt with the nuisance by an Act declaring all players of interludes to be rogues and vagabonds and liable to the unpleasant penalties provided those poor folk, unless formed into companies under the protection of a Privy Councillor, who would be answerable for their good behaviour. . . .

[O]ne company of players was under the protection of the Lord High Admiral, and another of the Lord Chamberlain, and . . . these were two of the most important members of the Privy Council, which . . . exercised supreme authority over printers and printing. . . .

*Id.*



On August 18, 1856, Congress granted "to the author or proprietor of any dramatic composition, designed or suited for public representation . . . the sole right . . . to act, perform, or represent the same . . . ." <sup>44</sup> This Act was in response to such economic factors as those that had shaped the English theater. <sup>45</sup>

While the playwright maintained the right to "print and publish the said [dramatic] composition" under the Gutenberg Model, <sup>46</sup> the public performance right was the first statutory provision protecting the right to exploit the aesthetic use of the expression embodied in a work absent the manufacture of multiple copies or the transfer of material property.

Though the performance right marked a new direction for copyright, it was influenced by three centuries of experience under the Gutenberg Model. The basic premise that the function of copyright was to protect against unfair competition was expressed in the public performance limitation placed on the right. Private performance of a dramatic work did not fall within the ambit of the new performance right because it was not regarded as a use of the expression that was

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44. Act. of Aug. 18, 1856, ch. 169, 11 Stat. 138.

45. Not much had changed in the manner of exploiting the use of the expressions of a playwright between Shakespeare's time and the revision of the United States Copyright Act in 1909:

There has been a good deal of discussion regarding subsection 9(d) of Section 1 [Act of 1909]. This Section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work. He does not usually publish his work in the ordinary acceptance of the term, and hence in such cases never receives any royalties on copies sold. . . . If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909). Congressional sensitivity to the nature of dramatic art was again evinced when it did not include dramatic performances within the "for profit" restrictions of the Copyright Act of 1909, ch. 320 § 1(d), 35 Stat. 1075 (1909). "The law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and therefore unauthorized performance, though gratuitous, will cause the author monetary loss, by depriving him of a potential audience." S. Ladas, *The International Protection of Literary and Artistic Property* (1938), cited in Study Prepared for the Senate Committee of the Judiciary, Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess. (1960), Study 16, at 83.

This particular awareness of the needs of the playwright's art is further illustrated by the care with which the 94th Congress approached the delimitation of limits on the exclusive right of performance in 17 U.S.C. § 110 (1982). While nondramatic and musical works are exempt throughout the section, only face-to-face classroom instruction without the use of actors, id. § 110(1), a single transmission to a blind audience of a work published ten years earlier, id. § 110(9), and communication of a dramatic performance over a receiver of the kind normally used in the home where no direct charge is made for the viewing, id. § 110(5), are exempt where the material used is dramatic.

46. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.



either in direct competition with authorized public performances or likely to reduce demand for public performance of the work. Nonetheless, there was and remains, no "for profit" limitation in the Act. It was assumed that demand for public performances of dramatic works, unlike musical compositions, would be reduced by any public performance whether or not for profit.<sup>47</sup>

When a performance right was finally granted to musical compositions in 1897,<sup>48</sup> the right was similarly limited to public performances. A "for profit" limitation was added to the right of public performance of music in the Act of 1909.<sup>49</sup>

Under present copyright law, the characterization of an event as either private or public is qualitative and not quantitative—the number of people experiencing the event is generally irrelevant. A performance before one hundred close acquaintances at a social gathering listening to an orchestra play a copyrighted song would be considered a private performance under Section 101. A similar performance before a single couple in a restaurant would be considered a public performance.<sup>50</sup>

From its beginning, the new follow-up right had one aspect that marked a total departure from the Gutenberg Model. The first sale doctrine was not applicable. The new right to exploit the use of the expression embodied in a specific copy of a work survived the sale of the copy.<sup>51</sup> Thus, the economic value of the aesthetic use of the expression was effectively separated from the economic value of an individual copy in which that expression was embodied.

### *The Visual Arts*

It has long been recognized that most works of visual art are not protected under the Gutenberg Model:

[C]onventional copyright protection though meaningful to writers, may be irrelevant to painters and other creators in the graphic arts. The prime (though not the only) protection afforded by copyright is the right to control reproductions of a given work. Since economic exploitation of the written word is mainly realized through repro-

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47. See *supra* note 45.

48. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

49. Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075.

50. See, e.g., *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

51. The exhaustion principle embodied in § 27 of the Act of 1909 applied only to the right to vend the particular copy while all other rights survived the vending.

duction, the right to control the making of copies constitutes the writer's key to the economic fruits of his creative efforts. Not so with the artist. Reproductions of works of art have not in the past, and probably still do not to any great extent, represent a meaningful source of income for most artists.<sup>52</sup>

The primary reason for this failure of the Gutenberg Model to provide economic incentive is that most works of art are incapable of reproduction in aesthetically equivalent copies.

As a result, the right to distribute copies of a work granted under section 106(3) of the Copyright Act of 1976 rings hollow. The right to distribute the single original is secured through traditional common-law concepts of property. Copyright protection as economic incentive under the Gutenberg Model adds virtually nothing of value to the artist.

Unlike the right of public performance, there was no right of public display prior to the copyright revision of 1976.<sup>53</sup> Any power to exploit economically the display of a work was derived from ownership of the copy.

The Copyright Act of 1976 included control of the incident of public display as one of the enumerated rights.<sup>54</sup> With the exception of

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52. 2 Nimmer on Copyright § 8.22[A] (1980).

53. 17 U.S.C. § 106(5) (1982).

54. Section 106(5) grants the author the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display that copyrighted work publicly."

Spain is the only nation in the foreign community to have a display royalty as part of its copyright law. Article 9, *Ley de la Propiedad Intelectual* (Jan. 10, 1879) states: "In the absence of an agreement to the contrary, alienation of the work of art shall not imply alienation of the right of reproduction, nor the right of public exhibition of the said work."

Of course, it cannot escape notice that the new English Public Lending Right Act, 1979, c. 10, would be classified as a private display right under United States copyright law. The English act "provides for a right to be conferred on authors, by virtue of which payments will be made in respect of loans of their books from public libraries." *Id.* (Preliminary Note). 17 U.S.C. § 101 states: "To 'display' a work means to show a copy of it . . ."; therefore, the reading experience is a "display" of the material read, and the taxing of a surcharge on the library experience is nothing less than a compulsory license based on a limited right of private display.

Such a library lending right is analogous to a right of private display for visual artists measured by a resale royalty. In other words, the experiential event, the reading of the book, is the compensable event for the writer, and that event is measured by the act of lending. The experiential event of private display of a work of visual art is similarly measured by a more public event, the resale of the copy.

Similar lending acts have been passed in Denmark (Law of March, 1946), Sweden (Royal Decree of 17 June, 1955, modified to June 1961), Norway (Law of 10 December, 1947), and West Germany (Copyright Statute, Law of 9 September, 1965).

granting additional protections to the copyright proprietor against utilizations of multiple images through the use of electronic media,<sup>55</sup> section 109(b) of the 1976 Act terminates the right of public display upon alienation of the copy.<sup>56</sup> The House Report on the 1976 Act states: "The . . . intention is to preserve the traditional privilege of the owner of copy to display it directly, but [sic] to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected."<sup>57</sup>

A close examination of the section 109(b) exemption and the above quoted text from the House Report reveals a deep doctrinal inconsistency. While the right of public display is an analogue of the right of public performance in that both rights render compensable the aesthetic use of the expression embodied in the copy, the public display right is not granted for the purpose of advancing the inherent right of the artist to benefit economically from aesthetic use. Rather its express design appears to be to protect the copyright proprietor where the market for multiple copies has been placed in jeopardy through expansive display by a legitimate owner of a copy. For example, textbook publishers feared electronic display of text which would destroy the market for their books. Thus, the new right is inappropriately structured around the requirements of the Gutenberg Model. For example, the right terminates upon sale of the copy and thus closely parallels the first sale doctrine. Furthermore, the right merely augments the Gutenberg Model and does not institute any radical change.

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55. 17 U.S.C. § 109(b) states:

Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

56. Section 109(c) admits the general principle that the lawful owner of a copy of a work should be able to put his or her copy on public display without the consent of the copyright owner. As in the cases arising under § 109(a), this does not mean that contractual restrictions on display between a buyer and a seller would be unenforceable as a matter of contract law.

The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or a display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the views [sic] are "present at the place where the copy is located."

House Report *supra* note 40, at 79-80.

57. *Id.* at 80.

The inevitable consequence of this doctrinal confusion is that precisely those works of visual art which cannot be exploited as multiple originals in the first instance cannot benefit from the new right of public display based on the Gutenberg Model. Thus, even with the new right of public display, copyright continues to fail as economic incentive to the visual artist working in unique originals. If the congressional purpose was to extend the copyright proprietor's right to control display beyond the sale of the copy where such display adversely affects exploitation under the Gutenberg Model, then it is paradoxical that such an extension should not be considered even more appropriate where the Gutenberg Model does not function in the first instance.

As the next sections of this commentary will demonstrate, both equity and justice require that the new right of public display be structured in a manner consistent with its kindred right of public performance. Such a structuring will require modification of the inappropriate exhaustion principle embodied in section 109(b) of the Copyright Act of 1976 thus allowing the new follow up right to survive the first sale of the copy.

### III. EXPANSION OF THE DISPLAY RIGHT UNDER FEDERAL LAW

The congressional grant of control over display extends only to public uses.<sup>58</sup> The statute defines a public display as one that occurs in "a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ."<sup>59</sup> Conversely, where the display takes place within a family context or at a place closed to the public, it is deemed private and hence not compensable under existing federal law.

Such a distinction between public and private aesthetic use of the expression embodied in a copy cannot be supported doctrinally. While appropriate measures of private use may be required by practical considerations to be substantially different from those developed to measure public use, the nature of the right of private display remains qualitatively unchanged from the right of public display. Thus, the answer to whether the public display right should be extended beyond the sale of the copy and whether there should be a federal right of

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58. 17 U.S.C. § 106(5) (1982).

59. *Id.* § 101.

private display depend on two interrelated questions: (1) Can such extensions be justified as a matter of public policy; and (2) Can meaningful measures of the compensable event be developed that will accommodate the artist's interest and other societal values.

### A. Public Display

One need only know the number of attendees at the recent Pablo Picasso exhibit in New York City at the Museum of Modern Art<sup>60</sup> or the Edward Hopper retrospective which toured the United States to grasp the economic significance of the artist's right to participate in public display. Without this right, the education and aesthetic indulgence of the public is being subsidized by the artist or the artist's estate. Monroe Price, in his seminal article on the *droit de suite*, observed: "In actual fact, a substantial part of the costs of the exhibition may be borne by the artist, not the dealer or museum."<sup>61</sup>

At a gallery exhibition the artist often pays for publicity, framing, hanging and opening night festivities. He may be charged a percentage of the rent. At museum exhibits, in particular feature exhibitions, the artist absorbs the cost of creating the work precisely for the exhibition. Proceeds from catalogue sales and special entrance fees go to the museum only.

Not only is the artist being denied a public display compensation fee in the context of art galleries and museums, but recently amassed corporate collections, many of which number thousands of pieces and amount to millions of dollars,<sup>62</sup> are events calling for compensation of

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60. It is estimated that between 1.2 and 1.5 million people saw the Picasso exhibit at the Museum of Modern Art, New York, N.Y., "[a] crowd 25 times the size of Napoleon's Army." Kramer, *Now That The Show is Over*, New York Times, Oct. 12, 1980 § 2 (Arts & Leisure) at 41, col. 1.

61. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 Yale L.J. 1333, 1353 (1968). In answer to the claim that such exhibits increase the value of the painter's later works, Price states:

Lawyers, architects, aerospace companies, all furnish some "free" services for promotional purposes. But the artists and sculptors, the institutionalization of the process of uncompensated exhibition has deprived them of the choice as to whether a show of his works should be income producing or not—and if so, the way in which he should modify his demand for payment.

Id. at 1355 n.57.

62. BankAmerica "began seriously to amass" its corporate collection in 1979; a collection that grew to a magnitude of 3,200 pieces in a period of three years. "BankAmerica found that collecting art seriously would combine asset management with an improvement of the working



the artist.<sup>63</sup> Through their art collections, the corporations combine asset management with improved working conditions and enhanced public image.<sup>64</sup> These works are often on display in public and communal areas and not just in the executive suite.<sup>65</sup> Nonetheless, where these works are displayed is unimportant because analysis of the federal definition of copyright reveals that the corporate use is public. The displays are either in areas open to the public or are beyond the "normal circle of the family."<sup>66</sup>

The trend in corporate acquisitions is to be encouraged; however, such encouragement need not be at the expense of a public display right for the artist.

Extending the right of public display past the vending of the copy would make the right doctrinally consistent with the follow up right of public performance. Nonetheless, such an extension must be carefully balanced against the owner of a copy's traditional incidents of ownership and the public interest in access to the work.

#### *Balancing Interests: Incorporeal, Tangible and Public*

The tangible interests of the owner of a copy have traditionally been subject to the author's incorporeal copyright interest.<sup>67</sup> The ex-

environment and at the same time would enhance the organization's public image." The BankAmerica collection is dwarfed by the massive 7,000 works in the pioneering collection of the Chase Manhattan Bank. The value of the Chase Manhattan collection has nearly doubled to \$7.5 million. Brooks, *Confessions of the Corporate Art Hunters*, ARTnews, Summer 1982, at 108-09.

63. See Price *supra* note 61, at 1342; Brooks, *supra* note 62, at 108.

64. See Brooks, *supra* note 62, at 109.

65. *Id.* at 110. The 6,000 art objects in the Security Pacific Collection are on display in public and communal areas.

66. 17 U.S.C. § 101 (1982).

67. Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object. . . . 17 U.S.C. § 202 (1982). It should be noted that prior to the 1976 revision of the Copyright Act, the courts presumed that the sale of the original work included all of the author's copyright interests in the absence of an express reservation (or at least proof of a clear intention to reserve) those rights. See *Yardley v. Houghton Mifflin Co.*, 108 F.2d 25 (2d Cir. 1939), cert. denied, 309 U.S. 686 (1940); *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949); *Parton v. Prang*, 18 F. Cas. 1273 (C.C. Mass. 1872) (No. 10,784); *Pushman v. N.Y. Graphic Soc'y, Inc.*, 287 N.Y. 302, 39 N.E. 249 (1942).

This judicial position, in the framework of the Gutenberg Model, illustrates the strength of the exhaustion principle and its relation to copyright as a printer's right—a financial interest in the



tent of an author's copyright can be either exclusive or subject to compulsory licensing.<sup>68</sup>

The follow up right of public performance is exclusively under the control of the copyright proprietor.<sup>69</sup> For example, the owner of a copy of Arthur Miller's *Death of a Salesman* must seek a performance license before he or she can present a theatrical production of the play. Similarly, the owner of a copy of sheet music or a sound recording must obtain the permission of the copyright proprietor in the underlying music before it can be performed publicly. Of course, inherent in exclusivity is the power to deny altogether use of the work under the right.<sup>70</sup>

Under compulsory licensing, the intangible interests of the copyright proprietor are not exclusive because he or she cannot deny anyone access to the work. Along with the fair use doctrine<sup>71</sup> and the idea/expression dichotomy,<sup>72</sup> compulsory licensing is a principal weapon in the congressional arsenal protecting the public interest in access to artistic works.<sup>73</sup> Through the device of compulsory licensing, the public may have access to the work in apparent derogation of the

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particular copy of a work that was exhausted upon sale. See *supra* text accompanying notes 32-40.

68. Under the 1976 revision of the Copyright Act, the following compulsory licenses were created or carried over from the 1909 Act: (a) 17 U.S.C. § 115 (1982) (nondramatic musical works), (b) *id.* § 116 (jukeboxes), (c) *id.* § 118 (noncommercial broadcasting), (d) *id.* § 111 (secondary transmissions).

69. With the exception of totally exempting certain public performances (i.e. non-profit, educational, religious) under 17 U.S.C. § 110 (1982), all public performances are exclusively within the control of the copyright proprietor under § 106(4).

70. It is this total ability to deny access that provides the author with economic leverage in the market place.

71. The "fair use" doctrine is embodied in 17 U.S.C. § 107 (1982).

72. See 17 U.S.C. § 102(b)(1982).

73. The first compulsory license was the mechanical recording license. Before its enactment, a congressional report stated:

It was at first thought by the committee that the copyright proprietors of musical compositions should be given the exclusive right to do what they pleased with the rights it was proposed to give them to control and dispose of all rights of mechanical reproduction, but the hearings disclosed that the probable effect of this would be the establishment of a mechanical-musical trust. It became evident that there would be serious danger that if the grant of right was made too broad, the progress of science and useful arts would not be promoted, but rather hindered, and that powerful and dangerous monopolies might be fostered which would be prejudicial to the public interests. This danger lies in the possibility that some one company might secure, by purchase or otherwise, a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business of manufacturing the [sic] selling music-producing machines, otherwise free to the world.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909). The company feared was the Aeolian. Study Prepared for the Committee on the Judiciary (Senate), Subcomm. on Patents, Trademarks, and

author's right to control access. As slight recompense the user must pay the author for the use.

In structuring an expanded public display right, a balancing of interests between artist and proprietor could be achieved through the use of compulsory licensing fees established by statute.<sup>74</sup> Through the device of compulsory licensing, the owner of the copy would be able to display publicly a copyrighted work at will. In return the owner would be required to pay the artist a statutorily established licensing fee. This fee might, in appropriate instances, be passed on to the public.

The right of public display coupled with use of a compulsory license would not limit public access to the work in any way. In fact, under such a scheme, access could be denied only by the owner's exercise of his property rights and not by the artist's exercise of copyright. Furthermore, just as the artist could not prohibit a public display, neither could he or she require it.

Thus, through elimination of the doctrinally inappropriate first sale doctrine embodied in section 109(a) of the Copyright Act of 1976,<sup>75</sup>

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Copyrights, 86th Cong., 1st Sess. (1960), Study 5, at 11 [hereinafter cited as Senate Study]. Thus, once the copyright proprietor of a song made a sound recording, anyone else could make a recording under § 1(e)(1) of the 1909 Act upon payment of a set licensing fee.

It should not escape notice that this first compulsory licensing provision was designed to combat enterprise monopoly (i.e. the aggregation of many copyrights). It has since been criticized as unnecessary in light of the Sherman and Clayton Antitrust Acts. Senate Study, *id.*, Study 6, at 113.

74. The writers acknowledge that compulsory licenses, while solving some basic issues in accommodating the interests of the author with first amendment values, are not without problems of their own. For example, compulsory licenses tend to distort the free enterprise system by dictating the author's initial bargaining position. See Senate Study, *supra* note 73, Study 6, at 106-07; see also Note, Moral Rights and the Compulsory License for Phonorecords, 46 Brooklyn L. Rev. 67, 80-81 (1979-80).

Professor Paul Goldstein suggests that an extension of compulsory licenses to all rights under copyright could have dire consequences. Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 U.C.L.A. L. Rev. 1107, 1136 (1977). Where compulsory licenses are allowed for the manufacture of copies (as with the mechanical recording license) product development is influenced resulting in a reduction of "the range of differentiation among work products." *Id.* at 1135, 1136 n.118. This flattening effect disserves the constitutional purpose to promote the progress of the arts. *Id.* This influence over product development is greatly reduced where the license is for a follow up right such as the performance of copyrighted works by cable systems; exclusivity of rights still operates in the development of the work's content and the manufacture of copies. *Id.* The same would be obviously true of a display right.

For a discussion of the constitutionality of compulsory licenses in terms of the author's exclusivity under the constitutional mandate, see Shaffer, Are the Compulsory License Provisions of the Copyright Law Unconstitutional? 2 Com. & L. 1 (1980).

75. 17 U.S.C. § 109(a) (1982).

the disparity in economic incentives between the visual artist and his or her colleagues in the performing arts would be significantly reduced.<sup>76</sup>

Under an expanded public display right, an equitable measurement of aesthetic use of works of visual art by public entities must be based, like the public performance right, on a measurement of demand and availability. Once the right has been granted, enforcement intermediaries—perhaps along the lines of the performance rights societies such as BMI and ASCAP<sup>77</sup>—could develop proper measures.<sup>78</sup>

The artist should not be required to support the education of the public out of his or her pocket. The means of developing financial mechanisms to accommodate the visual artist's incorporeal interest in public display and the tangible interest of the public institutional

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76. As was observed *supra* note 54, the reading experience is also a private display. It would have to be determined whether a right of private display subject to compulsory licensing would be limited to works of visual art or be extended to the literary arts thus creating a library lending right.

77. ASCAP came into being after the granting of a performance right in music. Sherman, *Incorporating of the Droit de Suite into United States Copyright Law*, 18 Copyright L. Symp. (ASCAP) 50, 66 (1970).

78. This article will not propose any specific mechanism or measure for a new right of public display; however, it is necessary to note that the structure of the measures will undoubtedly be complex because of the varied situations in which works of visual art are displayed. The complexity of the problem should not be allowed to negate the justice of the right.

As a possible means of approaching the complex issue of appropriate measures, the writers suggest that a flexible format for establishing licensing fees be utilized. For example, in the present Congress, a bill has been proposed that will place private audio and video recording under compulsory licensing by taxing recording machines and tape. H.R. 1030, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,214 (companion bill S. 31, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,206). Under § 119(c)(2)(A), (c)(3)(A) of the proposed bill, appropriate royalty fees are determined in two ways, through voluntary negotiation between a group of negotiators representing copyright proprietors and video tape and machine manufacturers, and through compulsory arbitration binding all those that did not elect to participate in the voluntary negotiations.

Under a flexible negotiating and arbitration scheme, representatives of major displayers (corporations and public museums etc.) could be segregated according to use for negotiations and arbitrations that reflect the particular realities of the various entities.

Although designed for a different purpose, a workable public exhibition fee schedule has been successfully used in Canada since 1968, and in Great Britain since 1979. Under this schedule, the fees are set as a function of the type of exhibition (e.g., regional, national or international; juried or nonjuried; touring or nontouring), the number of artists involved, and the duration of the exhibition. CARFAC, Recommended Minimum Exhibition Fee Schedule, Canadian Artists' Representation Le Front Des Artistes Canadiens, 1980 rev. 1982 (pamphlet). It has been confirmed that this schedule is successful in collecting fees from exhibition. Interview with Pat Durr, National Representative, CARFAC (Feb. 1984).

owner<sup>79</sup> of copy are uncertain. The granting of an expanded display royalty for works of visual art would require modification of the economic structure of our public museums and galleries. While imposing rights in public display would increase the burden on public institutions already faltering under financial strain, this fact cannot be allowed to silence the basic inquiry: who should pay the piper? If the public museums and galleries are in financial difficulty, the blame surely does not fall on the artists whose works are exploited. Since the birth of the public institutions of aesthetic consumption, the artist has been their primary benefactor. For a solution to the economic problems of these institutions, society should look elsewhere. Achieving financial stability for these public institutions will require a careful balancing of financial responsibility among actual users, government, and private sector sources.<sup>80</sup>

### B. Private Display

Because of the inability of the Gutenberg Model to serve as economic incentive to visual artists, various civil law countries of Europe as well as countries in Africa and South America and, most recently, the State of California have enacted some form of *droit de suite*. *Droit de suite* has become known in this country as the visual artist's "resale royalty."<sup>81</sup> Under this right, the visual artists share in the proceeds from the resale of their works.<sup>82</sup>

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79. Development of financial mechanisms for paying new copyright fees is of greater concern with the public museums and non-commercial galleries than it is with corporate displayers. While it is easier to accept a corporate surcharge where the presence of works of visual art enhance the working environment and thus promote productivity as well as corporate image, the problem is more sensitive where publicly supported institutions, already in financial difficulty, are concerned.

80. Performers have never been required to provide free support for the public education: the performing artists' contribution of their talents to the culture has been considered sufficient. When additional funds for operation have been needed, performing arts management have turned to private sector contributions, government grants, and increased box office revenues before reducing the performers' salaries or asking them to perform free.

Whether there is a correlation between the nature of economics in the performing and visual arts and the fact that the performing arts escaped nineteenth century structuring as educational institutions is purely a matter of conjecture.

81. The writers will use the terms *droit de suite* and resale royalty interchangeably. "Royalty legislation, in one form or another, is in effect in France, West Germany, Italy, Belgium, Portugal, Czechoslovakia, Yugoslavia, Turkey, Tunisia, Morocco, Algeria, Luxembourg, Chile and Uruguay." Duffy, *Royalties for Visual Artists*, 11 J. Beverly Hills B. 27, 28 (Jan./Feb. 1977).

82. See generally, Boyers, *Protection for the Artist: The Alternatives*, 21 Copyright L. Symp. (ASCAP) 124 (1975); Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, 6 Bull. Copyright Soc'y 94 (Dec. 1958).

Some commentators and at least one litigant<sup>83</sup> have argued that federal law forbids extending such a right under state law to American artists. Both the proponents of these arguments, and their opponents have implicitly assumed that the *droit de suite* must be tested against the Gutenberg Model. This false assumption is the result of historical failure to appreciate another complementary model, the Follow-Up Model. The Follow-up Model (recall from earlier discussion how this model created the right of public performance for playwrights) explains and justifies the *droit de suite*.

The following section of this article will discuss the *droit de suite* as a right of private display under the Follow-Up Model rather than as an extension of the right to vend under the Gutenberg Model.

#### 1. The Equitable Position of a Right of Private Display Under Federal Law

The *droit de suite* assures artists a more complete ability to enjoy the rewards of their creations. It is based on the premise that visual artists should have the same right as other authors to exploit fully the popularity of their creations.<sup>84</sup>

[T]he *droit de suite* would protect the right of the artist to exploit the most valuable process of the perception of his work—viewing. The *droit de suite* achieves this end by providing that, before another may be enabled to make use of the work for his own pleasure, the artist shall receive a reasonable compensation.<sup>85</sup>

Recognition of the *droit de suite* began in France in 1920 and spread to other countries.<sup>86</sup> The California Resale Royalties Act<sup>87</sup> is

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reprinted in 11 Copyright L. Symp. (ASCAP) (1962); Price, *supra* note 61 at 1333; Schulder, Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States, 61 Nw. U. L. Rev. 19, (1966-67); Sherman, *supra* note 77; Soloman & Gill, Federal and State Resale Royalty Legislation: What Hath Art Wrought?, 26 U.C.L.A. L. Rev. 322 (1978); Comment, The Applicability of the Droit de Suite In the United States, 3 B.C. Int'l & Comp. L. Rev. 433 (1979-80) [hereinafter cited as Applicability of Droit de Suite]; Comment, The Droit de Suite Has Arrived: Can it Thrive In California As it Has In Calais?, 11 Creighton L. Rev. 529 (1978) [hereinafter cited as In Calais].

83. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), cert. den. 449 U.S. 983 (1980).

84. Hauser, *supra* note 82, at 98.

85. Sherman, *supra* note 77, at 83.

86. See Duffy, *supra* note 81, at 28 n.3; see also, Applicability of Droit de Suite, *supra* note 82, at 437 n.13.

87. Cal. Civ. Code § 986 (West Supp. 1983). For a near complete legislative history of the California Resale Royalties Act, see In Calais, *supra* note 82, at 529-30 n.4.



the only example of the *droit de suite* in the United States. The precise statutory form given the right varies considerably from country to country. The controlling pattern established two distinct, general approaches that base the right either on a percentage of the full sale price, or a percentage of the appreciated value of the work at the time of resale.<sup>88</sup> The doctrinal bases for the statutory form given the right in Europe also vary considerably.<sup>89</sup>

While these foreign examples as well as the California Resale Royalties Act create the backdrop against which any discussion of the *droit de suite* must be cast, the history and the problems inherent in each statutory formulation have been discussed thoroughly by numerous commentators and need not be repeated here.<sup>90</sup> Instead, this commentary will focus on those general criticisms that reverberate through most of the essays. While these criticisms take different forms, they can be reduced to variations on four themes—the *droit de suite* is unnecessary, ineffective, unfair, and damaging to the art market.

a. Necessity—The Right Under Contract and Incidents of Multiple Reproduction

A statutory *droit de suite* is claimed to be unnecessary because the artist is able to provide for similar benefits through covenants in the sales contract for the copy. Thus for example, "The Artist's Reserved

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88. France, Belgium, Morocco, West Germany and Tunisia impose a "uniform tax upon the total sale price" of the work. Boyers, *supra* note 82, at 132 n.16. Portugal, Italy, Poland and Czechoslovakia base their royalty on the increased value of the work. *Id.*

The California Resale Royalties Act is a hybrid of the two monistic European systems. The royalty is not applied until there has been an increase in the value of the work. Cal. Civ. Code § 986(b)(4) (West Supp. 1983). However, if there has been an increase of even one cent, the 5% surcharge on the transaction applies to the full resale price.

89. For example, Germany bases the right on the assumption that works of art have an inherent and unrealized aesthetic value that later becomes recognized with a resulting increase in market value. Since the true value was present from the beginning, the artist should be able to participate in the increased value of the later resales. Another school of thought bases the artist's right to participate on the fact that the appreciated value of the work upon resale is the result of the artist's continuing work. In other words, as the artist matures and continues to produce, the increased value of the later works drives up the value of the earlier ones. Since the appreciated value of the early works is the result of the artist's continuing efforts, he or she should be able to participate in this increased value upon resale. See Schulder, *supra* note 82, at 30-32.

90. See generally, Kunstadt, Can Copyright Law Effectively Promote Progress in the Visual Arts?, 23 Bull. Copyright Soc'y 233, (1976); Ashley, A Critical Comment on California's Droit de Suite, Civil Code Section 986, 29 Hastings L. J. 249 (1977-78); and the commentators cited *supra* note 82.



Rights, Transfer and Sale Agreement," a form contract, drafted by Robert Projansky in 1971 includes a provision for a resale royalty.<sup>91</sup>

In 1968, Professor Monroe Price discussed the potential for achieving a *droit de suite* by contract within the context of the "theology" that artists lack the bargaining power to demand such rights through contract, noting that "[t]he prophecy of powerlessness is self-fulfilling."<sup>92</sup> By 1977, Professor Price's thinking on the subject had become "enriched . . . — . . . economic benefits and royalty rights [had not] come through contracts in the marketplace."<sup>93</sup> One commentator has observed:

[B]ecause of lack of bargaining leverage, artists have found it quite difficult to utilize the artists' royalty reservation agreement. Is not surprising that when an artist is faced with either foregoing the contract or losing a sale, the artist will usually forego the birds in the bush (along with the principles they represent) for the one in the hand.<sup>94</sup>

Even for the popular artist with the bargaining ability to demand such a contract, enforcement of its covenants is fraught with difficulties.<sup>95</sup> "Covenants run no more gracefully with works of art than with most chattels."<sup>96</sup> Therefore, although the advantages of a *droit de suite* are theoretically achievable through careful use of contract, this private alternative has so rarely been used as to fail utterly to vitiate the need for a statutorily enacted follow up right.

Critics similarly argue that visual artists are adequately protected through control of the incident of multiple reproduction. "To the extent that an artist can create and sell a large number of multiples . . . the need for a residual interest in any particular work is reduced."<sup>97</sup> Inherent in this criticism is the failure to recognize that many forms of art are not capable of reproduction in multiples. In addition, many artists simply do not desire to produce multiple images.

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91. The Artist's Reserved Rights Transfer and Sale Agreement, reprinted in *A Guide to the California Resale Royalties Act 23* (M. Price & H. Sandison ed. 1976). Samples of the Projansky contract also appear in appendices 24 and 27; L. DuBoff, *The Deskbook of Art Law*, 1131-33, 1138-39 (1977); Projansky & Siegelau, *The Artist's Reserved Rights Transfer and Sale Agreement*, in *Art Works: Law, Policy, Practice* 81 (F. Feldman & S. Weil ed. 1974) [hereinafter cited as *Law, Policy, Practice*]; *Artist's Agreement*, 181 *Studio Int'l* 186 (April 1971).

92. Price, *supra* note 61, at 1358.

93. Clack, *Artists' Rights*, *The Cultural Post*, Mar./April 1977, at 11.

94. Duffy, *supra* note 81, at 36.

95. *Id.* at 34-35.

96. *Law, Policy, Practice*, *supra* note 91, at 97.

97. Duffy, *supra* note 81, at 32-33.

The *droit de suite* applies to the private display of the unique original by multiple private owners through the sequential ownership of a single copy. The exploitation of multiple derivatives is irrelevant when considering the right of the creator of the unique original to exploit the direct experience of the work. Just as the right of the novelist to exploit the film rights of his literary works exists independently of the right to control the production and distribution of multiple originals of the manuscript, the right of the visual artist to control the experiencing of the expression provided by the unique original exists independently of the right to control the manufacture and vending of derivatives of it.

b. Effectiveness—Right Vs. Welfare and the Low Incidence of Resale

At the crux of the debate, however, is the view of the *droit de suite* as welfare. The seeds of this perception in the United States were aptly illustrated (if not sown) in Monroe Price's seminal article on the French *droit de suite* where he characterized the "fervor" for the right as a "deep-seated romantic view of art"<sup>98</sup> and of the artist starving in his garret. The result of this "nostalgic recollection of the late nineteenth century"<sup>99</sup> is that the commentators are led to the conclusion that the *droit de suite* fails because, instead of benefiting the starving artist, the right has "benefited only the more successful, and hence wealthier, class of artists."<sup>100</sup>

The argument misses the mark, however. The *droit de suite* cannot be understood as "welfare legislation." On the contrary, it should operate within the copyright scheme in exactly the same manner as the presently recognized rights in the statute do.

The first prerequisite of copyright as economic doctrine is the existence of a market force—experiential demand. Copyright is designed

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98. Price, *supra* note 61, at 1334. "The *droit de suite* is *La Boheme* and *Lust for Life* reduced to statutory form." *Id.* at 1335.

In almost every discussion of this subject the story of the sale of Millet's *Angelus* for 1,000,000 francs while his granddaughter sold flowers in the streets is recounted. The drawing of Forain, depicting two children in rags observing the sale of a painting for 100,000 francs and saying: 'Look, one of papa's paintings,' is constantly described. Sherman, *supra* note 77, at 56. In the only empirical study on resale of works of art in the United States, the problem of artist selling their works for nearly nothing only to have them resold later at fabulous prices is exaggerated. Camp, *Art Resale Rights and the Art Resale Market*, 28 *Bull. Copyright Soc'y* 146, 151 (1980).

99. Price, *supra* note 61, at 1335.

100. Duffy, *supra* note 81, at 32.

to allow the author to share in the economic exploitation of his or her successful works. The exclusive rights to reproduce, prepare derivative works, and, in fact, the right to vend are only of value to the author whose works are in demand. While the author maintains the right to control the potential measuring incidents of the experiential event, the need for protection lies dormant until the marketplace triggers those incidents. No unsuccessful author realizes economic gain under existing copyright.<sup>101</sup>

When the critic of the *droit de suite* claims that the right will be ineffective because it benefits the successful artist, inherent in the criticism is the assumption that the constitutional mandate "[t]o promote the progress of science and useful arts" is fulfilled at the level of satisfying needs. Thus, adding to the coffers of the already successful (and possibly wealthy) is deemed to run counter to the mandate. Recently, critics of the proposal to extend a performance right to proprietors of copyright in sound recordings claimed such a grant to be unconstitutional in the absence of proof of need. The House of Representatives Committee on the Judiciary resoundingly rejected such a proposition:

In the first instance, . . . it is virtually unheard of to suggest that a copyright owner should be restricted to receiving compensation from one or more forms of exploitation of his work, if, in someone's (let alone a user's) judgment, such compensation is considered "adequate." Beyond this, no evidence has been offered which would reasonably lead to the conclusion that, at any time during the history of copyright law in the United States, an affirmative, definitive showing of economic "need" is required to invest Congress with the authority to extend protection to a particular form of exploitation of an already copyrightable work of authorship. Similarly, no support is offered for the proposition that historically, it must be proved that the quantity of copyrightable works will actually increase before Congress is empowered to enact legislation to "promote the progress of science and the useful arts." While these arguments may be admired for their creativity, they do not withstand scrutiny.<sup>102</sup>

The Committee went on to respond to the National Association of Broadcasters' contention that the proposed performance royalty

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101. However, one should pause to observe that the *droit de suite* furnishes artists who sell works early in their careers cheaply some security that they may derive some economic benefit later from the successive enjoyment of the work.

102. House of Representatives Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 2d Sess., Serial 83, Performance Rights in Sound Recordings 157 (Comm. Print 1978) [hereinafter cited as *Performing Rights in Sound Recordings*].

would exceed congressional authority because it would be ineffective by noting the United States Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*:<sup>103</sup>

The Court . . . made no finding that protection would in fact cause the human cannonball to soar to even greater heights, nor that "little Zacchins" would enter the human cannonball business, nor were any such findings necessary . . . The Court did find . . . that the intention of such laws is, "to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public." *In other words, the rights themselves, by their very existence are designed to provide an environment where there is incentive to create works ultimately enuring to the public benefit.*<sup>104</sup> (emphasis added).

In addition to arguing that the resale royalty is ineffective as welfare legislation, the critics claim it is ineffective because of the low incidence of resale. In response to this Solomon and Gill say "[I]f the [royalty] is viewed as a matter of right, the number of artists who actually receive the benefit should be irrelevant . . . ."<sup>105</sup> The proportion of paperback novels being made into films is absolutely miniscule, yet no one would dare suggest that, because of this, the right to control derivative works under section 106(2) should be dropped as a meaningful incident to measure that particular use of the work.

Furthermore, the assertion that the number of resales is small bears examination. Commentators have estimated that artists in the United States who would benefit by the resale royalty number between fifty living artists who have a "secondary or resale market for their work,"<sup>106</sup> and thirty-four percent of the artists whose works are sold in any given year<sup>107</sup> (a number which could be in excess of several thousand.) No statistics exist on the total art resale market, but inferences as to its magnitude can be drawn. In a 1978 empirical study by Tom R. Camp confined to art auctions at Sotheby Parke Bernet for the four year period between 1973 and 1977, 152 living artists had resales of works that would have qualified for payment under a *droit de suite* applying to works valued at \$1,000 or more on resale.<sup>108</sup>

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103. 433 U.S. 562 (1977).

104. Performing Rights in Sound Recordings, *supra* note 102, at 158-59.

105. Solomon & Gill, *supra* note 82, at 341.

106. *Id.*

107. Price, *supra* note 61, at 1349.

108. Camp, *supra* note 95, at 151.

Mr. Camp's study had only marginal statistics for nonliving artists who would be covered were the royalty for works reselling for \$1,000 or more extended to life plus fifty years. Eleven American artists who died within five years of the four year study period had resales.<sup>109</sup> A reasonable projection could yield a figure of approximately 110 non-living artists whose families would benefit from the royalty.

Therefore, the royalty for works selling at Sotheby Parke Bernet alone for \$1,000 or more by artists under a life plus fifty years statute would benefit approximately 262 artists or their families. When we consider that art sales and resales in the United States, unlike France, do not take place primarily at public auction,<sup>110</sup> the number of resales may in fact be quite significant.

In a 1980 newspaper interview, Sotheby Parke Bernet President, Peter McCoy, estimated that their Los Angeles auction house had paid resale royalties to between fifty and 100 artists, and Melvyn Nefsky, a Los Angeles accountant and business manager for several artists and dealers, said he personally had seen at least fifty resale royalty checks.<sup>111</sup> Calvin Goodman, a Los Angeles management consultant who specializes in the art market, estimated that about \$750,000 was due in 1980 artists' royalties "if everybody were playing straight up."<sup>112</sup> This three-quarter of a million dollar projection is only for resales taking place in or by the residents of one single state!

#### c. Fairness—The Owner of the Copy

Coupled with the myopic view of the *droit de suite* as welfare and the purported low incidence of resale is the belief that the royalty is somehow unfair to the owner of the copy. As a "major theoretical criticism," the royalty is seen to run "counter to our notions of property ownership . . . Why should works of art be treated differently from other chattel?"<sup>113</sup> One commentator has forcefully answered this question with a twofold response:

First, art works must be considered to be different from other property because of the contribution they make to our cultural heritage. This is a point that most Europeans, and many Americans, are

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109. *Id.*

110. Ashley, *supra* note 90, at 255, 258.

111. Isenberg, *The Art Royalties Act: The 5% Evasion*, L.A. Times, Dec. 21, 1980 (Magazine) at 6, col. 3.

112. *Id.* at 6, col. 2.

113. Schulder, *supra* note 82, at 28.



coming to accept without question. Secondly, the art proceeds right can be justified as a property right that persists after alienation of the physical object. To begin with, the United States Constitution has taken a special view of artistic and scientific works. The Constitution gives Congress the power to give exclusive rights to artists to their work (for a limited period of time) so as to promote the progress of the arts. The divisibility of the copyright is accepted and is expressly set forth in the Copyright Revision: "The ownership of a copy is recognized distinct from ownership of the material object." Artists may sell their work and, yet, retain their copyright.<sup>114</sup>

Because the *droit de suite*, as a right under copyright, would not attach to the material manifestation of the work but rather to the aesthetic use of the expression, the right of the owner to dispose of the copy at will would not be affected by the right. The Court of Appeals for the Ninth Circuit in *Morseburg v. Baylon*<sup>115</sup> rejected the appellant's argument that the owner of the copy had lost a fundamental property right. The court denied "that the [California] Resale Royalties Act affects the very heart of the relationship between buyers and sellers of art; and that there is no public interest whatsoever to support such meddling."<sup>116</sup> The court found the Act to be "neither arbitrary nor capricious" but supported by a rational basis.<sup>117</sup> Viewing the legislation as a reasonable means of adjusting burdens and benefits of economic life, the court held that "[i]n its present form [the Act] does not affect fundamental rights."<sup>118</sup>

### 1.) *The Art Investor*

However, the unfairness criticism appears to gather particular force when the owner of the copy is an art investor:

Since the collector's money is at risk, is it equitable that a collector must pay the artist if the work appreciates, yet bear the loss if the work depreciates in value? Isn't it logical, given such a situation, that the artist reimburse the collector if the value of the work decreases? The situation is aggravated if the royalty is payable even if there is no profit on resale . . .<sup>119</sup>

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114. *Id.* at 28-29.

115. 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1981).

116. *Id.* at 979.

117. *Id.*

118. *Id.*

119. Duffy, *supra* note 81, at 32; see also Schulder, *supra* note 82, at 29-31.



This criticism focuses heavily on the highly speculative<sup>120</sup> and very limited<sup>121</sup> art investment market. It fails to recognize "that most purchasers do not buy predominantly for investment purposes."<sup>122</sup> More importantly, it approaches the investment use of art works in an experiential vacuum. One recent commentator reduced works of art to the level of securities.<sup>123</sup> But painters do not paint fungible securities, they produce unique works with individual aesthetic values.

What these economists preoccupied with numbers fail to consider is what Professor DuBoff has identified as the "psychic dividend."<sup>124</sup> This psychic dividend evolves from the investor's aesthetic use of the work's expression—it is the result of private display. To avoid this psychic dividend, the investor would have to place the work beyond experience. However, risking hyperbole, if all of the "valuable" works

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120. DuBoff, *supra* note 91, at 365-66.

121. Price, *supra* note 61, at 1351.

122. *Id.*

123. Bolch, Damon, & Hinshaw, *An Economic Analysis of the California Resale Royalty Statute*, 10 Conn. L. Rev. 689 (1978).

124. DuBoff, *supra* note 91, at 364.

When the capital value of a stock increases and the dividend remains constant, the percentage return has fallen. In this situation, investment counselors usually advise clients to sell and reinvest in a stock paying a higher dividend. In other words, a wise investor always tries to maintain a constant percentage return vis-a-vis his portfolio value. An art investor could theoretically follow this same practice—albeit on an aesthetic rather than an economic level. Thus, when a creation is purchased, the collector should receive a certain psychic dividend from the piece. If this periodic return from mere enjoyment declines, the art investor, like his stock purchasing counterpart, should re-examine his portfolio and determine whether to sell and reinvest in a piece which brings an aesthetic dividend more accurately reflecting the creation's cost. Similarly, if a work of art appreciated in economic value, the investor should determine whether the psychic dividend is such as to be worth retaining this investment.

*Id.*

The existence of a "psychic dividend" can be costly, however, under the Internal Revenue Code. In *Wrightsmen v. United States*, 428 F.2d 1316 (Ct. Cl. 1970), the Court of Claims drew a distinction between an art "investor" and an art "collector" in determining whether the costs of acquiring and maintaining a collection (insurance, travel, cleaning) were deductible under I.R.C. § 212. While the court rejected the Internal Revenue Service's claim that deduction was possible only "by showing a physical segregation of the works of art which precludes personal pleasure," 428 F.2d at 1319, it held the existence of an investment purpose was insufficient to claim deductions where "personal pleasure or satisfaction" is primary. *Id.* at 1322. As Robert Duffy points out, proof that investment and not pleasure is of first importance is a nearly impossible burden for the collector to carry under *Wrightsmen*. R. Duffy, *Art Law: Representing Artists, Dealers, and Collectors* 420 (1977). For an extensive discussion of *Wrightsmen*, see DuBoff, *supra* note 91, at 581-90. See also, Notreb, *The Art Collector vs. the Tax Collector*, *Financial World*, May 1, 1982, at 42. Compare *George F. Taylor*, 6 T.C.M. (CCH) 275 (1947) (deduction allowed where stamp collector derived no pleasure from his collection).

of art were so secured, their investment value would vanish. It is precisely the aesthetic use of a work's expression that creates the investment value. Therefore, speculating in works of art in an experiential vacuum would make as much sense as speculating in the securities issued by a corporation that has neither assets nor productive activities.

Regardless of the market price on resale, the artist's right to participate economically in the work's aesthetic use should be unaffected. An investor would readily recognize the validity of transaction costs<sup>125</sup> imposed in connection with a sale, regardless of the market conditions at that time. So too, this levy on the aesthetic use is conceptually appropriate irrespective of the market price of the work upon resale. Thus, the artist's right to participate should continue so long as demand propels the work from one owner to the next. The surcharge should be applied even when a successive owner values the viewing experience less than previous ones.<sup>126</sup> When the *droit de suite* is viewed as a surcharge levied upon display by private parties as they occur seriatim, it becomes clear that it is not, in fact, the seller-owner who ought to pay but the buyer-owner.<sup>127</sup>

## 2.) *The Art Dealer*

Art dealers have been the primary interest group resisting application of the California resale royalty. Levying the royalty against dealers is inappropriate and a disservice to the art market. For example "[d]ealers sometimes agree among themselves to display the works of artists represented by other dealers. These agreements usually provide that the dealer who displays the work of an artist outside his fold will buy some of the paintings from the artist's sponsoring dealer if he cannot sell a certain minimum. Lending agreements of this kind expose the artist's work to a wider audience and increase his chances for success."<sup>128</sup> If there were no such dealer exemption, such transactions, while increasing the artist's chance for success, would be subject to the resale royalty.

In general, the dealer's use of a work is aesthetically neutral and, therefore, comes as close as is possible to an experiential vacuum (pure

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125. Transaction costs would include such items as the dealer's or auctioneer's commission as well as costs of shipping and insurance.

126. See Schulder, *supra* note 82, at 30.

127. Only where the *droit de suite* is viewed as the right to participate in the investment use of the work is the levy made against the seller, i.e., against the person making the profit.

128. Ashley, *supra* note 90, at 257.

investment use). Display, by definition, involves aesthetic use of the expression embodied in the work. In the absence of such use no royalty should be exacted.<sup>129</sup>

California State Senator Alan Sieroty, author of the California Resale Royalties Act, recognized the problem in levying the royalty directly upon art dealers and introduced legislation in 1982 to exempt art dealers partially.<sup>130</sup> Thus the 1982 amendment to the California Resale Royalty Act exempts "the resale of a work of fine art by an art dealer to a purchaser within ten years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers."<sup>131</sup>

#### d. Damage to the Art Market—Problems Inherent In Regional Protection

Critics of the California Resale Royalty Act claim that the right will have an adverse effect on the art market because it tends to: (1) induce participants in art sales to consummate their transactions in jurisdictions without similar legislation, (2) drive collectors from the art market to other forms of investment, and (3) generally diminish the market for contemporary works. Whatever merit these criticisms might otherwise have, federalizing the California law would eliminate them.

In France, where the *droit de suite* operates nationally, fears that the total volume of art sales would be diminished by the right have proved groundless.<sup>132</sup> Nonetheless, some commentators believe, even though the total volume of French art sales has not diminished, France's position in international markets has been reduced as a result of some portion of the market shifting to nations without legislation.<sup>133</sup> There may be some validity to this criticism since the French

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129. Under the 1982 revision of the California resale royalty, the ten year limitation on exempting dealer transactions is a legislative finding that any work held for more than ten years by a dealer is presumed to be held for aesthetic purposes and is within the ambit of the royalty.

130. Cal. Civ. Code § 986(b)(6) (West Supp. 1983).

131. *Id.* Dealer transactions were exempt in the only proposed federal legislation. H.R. 11403, 95th Cong., 2d Sess. (1978). It is most likely that if all dealer transactions were exempt, criticism would not be so vocal if it existed at all. Solomon & Gill, *supra* note 82, at 334 n.80; see also Camp, *supra* note 98, at 159-60.

132. Applicability of *Droit de Suite*, *supra* note 82, at 440 nn.37-39.

133. Price, *supra* note 61, at 1334 n.7; Applicability of *Droit de Suite*, *supra* note 82, at 452 n.135 (citing Price), 459 n.182 (citing Note, Artists' Resale Royalties Legislation: Ohio Bill 808

legislation only reaches French resales. This problem could be avoided in the United States if federal jurisdiction were based on both sales in the United States and United States citizenship of either the artist or the seller. Consummation of the sale in a non-*droit de suite* jurisdiction would be pointless since the American artist would be entitled by United States law to collect the royalty fee regardless of where or to whom the work was sold.

Criticism that the *droit de suite* will adversely affect the art market is unfounded primarily because it assumes that acquisitions, occur in what was discussed earlier as an "experiential vacuum." It assumes that the buyer views comparably positioned works as fungibles without particular "aesthetic dividends" flowing from a specific work. Furthermore it assumes the number of investors who consider works of art fungible is sufficient to have an impact on any market. Since the number of individuals who collect art purely for investment reasons is small in comparison to the total number of participants in the market,<sup>134</sup> this assumption cannot be justified.

The assertion that collectors will switch from works of art to other forms of investment or from contemporary forms to older works not covered by the right must yield to the same reasoning. Such an assertion ignores the psychic dividend which comes to the collector by experiencing work indigenous to his or her own cultural milieu. In other words, it assumes that the art investment takes place in an experiential vacuum. The Camp study revealed that due to the subjective nature of placing economic value on works of art, the five percent royalty under the California legislation is not likely to have an appreciable effect on collector choices.<sup>135</sup> While collectors are "aware of prices and somewhat sensitive to them," Camp's impression was that other factors such as confidence in the dealer were more important to the collector than the sale price.<sup>136</sup>

## 2. Private Display As a Compensable Event for the Visual Artist Under Law

All statutory rights under copyright are statements of events the law has rendered compensable. While the compensable events are both

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and a proposed Alternative, 9 Toledo L. Rev. 366, 392 (1978) [hereinafter cited as House Bill 808]. See generally Note, A Proposal for National Uniform Art-Proceeds Legislation, 53 Ind. L.J. 129, 132 (1977-78).

134. See *supra* text accompanying notes 120-21.

135. Camp, *supra* note 98, at 158.

136. *Id.* at 159.

doctrinally constant and explicitly stated in the copyright act (e.g., vending copies, displaying, and performing), the measures that have developed to provide practical means of quantifying the author's economic return from those events are not doctrinally constant but vary as technology alters and adds to the means of accessing the compensable event.

Once the copyright had been granted, the development of the collection method for compensation has been left, in large part, to the forces of the marketplace. The market has not been allowed to shape the nature of the compensation in those instances where events are subject to statutory compulsory licensing. The compulsory license removes the copyright proprietor's only bargaining tool, the right to deny access to the compensable event and in return assures him or her a guaranteed statutorily set fee.

The development of compensation schemes has varied greatly with the different subject matter of copyright.<sup>137</sup> Nonetheless all these measures are basically means of estimating price or value from demand and supply, the traditional determinants in a capitalist economy.

Because the compensable event is at the very core of all rights under copyright and the measures are potentially fleeting and of little lasting consequence to its scheme, the measure of the compensable event must be viewed as analytically distinct. A well reasoned development of copyright law requires that the event being measured not be confused with the measure itself.

It is the thesis of this commentary that just such a confusion has developed with the *droit de suite*. While the *droit de suite* is phrased in terms of the resale of the material copy, it is, in actuality, the private display of the work to a new purchaser, his or her family, and social acquaintances that is the compensable event. The resale is merely a convenient measure of that event. As such, it both signals when a new private display has begun and quantifies the value of that new experiential event.

Thus, under the *droit de suite*, the purchase of a work of visual art obtains two interests in the work: (1) absolute possession of the material object, and (2) a license for its private display. At the first sale, the

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137. For example, the copyright proprietor of nondramatic music generally does not individually negotiate for performance fees but allows the performance societies (ASCAP & BMI) to establish rates and collect and distribute fees to the appropriate proprietors. Compare that to proprietors of literary property who still individually negotiate with the enterprises which bring literary works to the public.



license can be thought of as "implied" since the licensing fee is included in the purchase price. At the time of subsequent transfers, renewal of the display license fee becomes due. Such a formulation of a right of private display is not beyond practical, or at least scholarly, contemplation. Professor Melville Nimmer advanced a similar proposal concerning a private performance license for purchasers of video discs for home use. "If a [private] performing rights license were thought to be necessary, the original purchaser of a video cassette or disc might be thought to be an implied licensee, but this would not necessarily be true of a purchaser upon re-sale from the original buyer."<sup>138</sup> Thus subsequent purchasers would have to pay a license fee to the owner of video cassette's or disc's copyright owner.

Unlike the right of public performance or the right of public display, a compensation for private use based on a measurement of actual use necessarily threatens the user's countervailing right of privacy. Resale of the copy represents the least intrusive and the most public incident that may attach to a privately owned copy. As such, it is the most appropriate indicator that a work has moved from one private display context to the next.

Resale may be an imprecise gauge of private display. Transfers by gift or inheritance, while perhaps representing new, and, in the purest sense, doctrinally compensable private displays, would not show up as resales. To the extent such transfers could be feasibly monitored,<sup>139</sup> it would then be appropriate to treat them as "sales" at fair market value and accordingly levy the resale royalty.

When the event which triggers the royalty payment is the resale of the copy instead of its display, the doctrinal justification of the display right and royalty fee becomes confused with the body of law that has shaped the parameters of property interests in the material object. Unfortunately the measure (resale) has been confused with the compensable event (private display). If the compensable event is the resale itself, then the principles of the Gutenberg Model must apply with all of its underlying implications, including the first sale doctrine. This was the position taken by the opponents of the *droit de suite* when they unsuccessfully challenged the constitutionality of the California

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138. 2 Nimmer on Copyright § 8.14[C] n.47 (1982).

139. Of course, if the United States were to establish a national art registry, the monitoring of the shift of a work of art from one private user to the next would be possible regardless of the nature of the transfer.



resale royalty in *Morseburg v. Balyon*.<sup>140</sup> However, if the compensable event is the private display of the work under the Follow Up Model in which the resale of the copy simply operates as a measure of both the occurrence and value placed on the experiential event, then the first sale doctrine is inapplicable.

Under the *droit de suite* the right of the owner of the copy to aesthetic use of the art object remains subject to the artist's inchoate interest in private display. When the material copy is transferred by one purchaser to another for private enjoyment and use, a new license for private display arises.<sup>141</sup>

Private display already plays a significant role in the economics of intangible property. Newspaper and magazine advertising rates are not based on the number of copies sold but rather on the number of readers the advertiser expects to reach. This evidences the conceded value of private display. However, in this publishing context, the publisher-copyright proprietor's control over private display is a func-

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140. 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980). In *Morseburg*, the Court of Appeals held California's legislation creating a resale royalty constitutional.

The action, brought by Howard E. Morseburg, President of Morseburg Galleries in Los Angeles, was a challenge based on federal preemption of the California legislation under the Copyright Act of 1909. While specifically limiting judgment of the preemption issue to the Act of 1909 thus leaving the question open under § 301 of the 1976 Act, the court held:

The Copyright Clause does not prevent the enactment by California of the Resale Royalties Act. Nor has the Copyright Act of 1909 explicitly forbidden the enactment of such an act by a state. A bar by implication cannot be found in the word "vend" in section 1 of the 1909 Act.

621 F.2d at 977.

In addition to preemption, *Morseburg* also sought relief on the bases of (1) impairment of contract under the Contract Clause of the Constitution, and (2) violation of due process arising from the retroactive nature of the statute. Finding not all impairments of contract by operation of state law were improper, the court determined that any present impairment was of insufficient magnitude to trigger the Contracts Clause. *Id.* at 978-79. The court dismissed the due process argument by finding that the retroactive effects of the California Act were also of insufficient magnitude to merit consideration. *Id.* at 979-80.

In examining the § 27 prohibition against "restricting" sale under 1909 Act, the *Morseburg* court found that: "[t]echnically speaking such acts in no way restrict the transfer of art works. No lien to secure the royalty is attached to the work itself, nor is the buyer made secondarily liable for the royalty." *Id.* at 977-78. The court did acknowledge that the royalty might influence the length of time an owner might hold a work as well as having other consequences. *Id.* at 978. In essence, the court found that *some restrictive influences* on the resale of a copy were permissible under § 27 of the 1909 Act.

It was the opinion of the court in *Morseburg* that the state created resale royalty was an additional right that is distinct from the author's right to vend the copy. *Id.* at 977. The court took no pains to delineate the nature of this "additional right."

141. On occasion, however, a privately owned work will be transferred to a public institution. Such a transfer should not be subject to a resale royalty but should become subject to the artist's expanded right of public display.

tion of his or her economic power and not a legislatively granted right. The economic interdependence of the parties (the publisher-copyright proprietor and the advertiser) provides the copyright owner the leverage needed to render private display compensable.

If the visual artist possessed the same negotiating power over private display as the newspaper or magazine publisher, a statutory right of private display would perhaps be unnecessary. Such power, however, simply does not exist.<sup>142</sup> There is no economic interdependence between the visual artist and the purchaser of the copy.

As a matter of power as opposed to right, the artist's only presently existing opportunity to exploit those future private displays is through contractual arrangements with the first purchaser. As was noted earlier,<sup>143</sup> such contractual arrangements have not proven successful both because of the difficulties in their enforcement and because requiring such provisions upon sale assumes bargaining power in the first instance. Therefore, the granting of a statutory right of private display for the visual artist would echo copyright's most basic function—the granting of a right where power fails and doctrine requires it.

### 3. Private Display As a Compulsory License

Appropriate respect for the constitutionally protected rights of privacy of the owner of the copy requires structuring a rough measure of private use around as public an event as possible. Great care should be given to maximizing the owner's control of private display while at the same time providing the artist with compensation for the work's aesthetic use. As with the proposed extension of the right of public display,<sup>144</sup> this balancing of the interests of the artist and the owner would be best achieved through a system of compulsory licensing.<sup>145</sup>

Under a compulsory private display license, the value of the experiential event could be approximated as a function of the resale price of the copy. Questions of when, how, and even whether a copy would be resold would be answered only by the owner of the copy—the artist's interest extending no further than the right to be paid for use by any new private purchaser.<sup>146</sup>

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142. Unlike the relationship between the proprietors of literary property and magazine advertisers where economic needs are intertwined, there is no economic interdependence or ongoing economic relationship between the visual artist and the purchaser of a work of art.

143. See *supra* text accompanying notes 91-96.

144. See *supra* text accompanying notes 60-80.

145. In this respect, the California resale royalty functions as a compulsory license.

146. The statutory formulation of an exact method of payment is doctrinally irrelevant. Even though the purchaser upon resale is doctrinally responsible for the fee, the law is not without

Enactment of a federal *droit de suite* would not require modifying any elements in the present statutory scheme. As a right of private as opposed to public display, the *droit de suite* would have no impact on the section 109(a) embodiment of the first sale doctrine.<sup>147</sup> It does, of course, raise basic policy issues as to what is the proper subject matter of the new right. A right of private display that is not limited to works of visual art would extend to literary works since "display" is at the root of the reading experience as well. In the future, cable, satellite, and computer technologies will most likely shift the primary means of accessing the content of literary works from the vending of copies to ephemeral images on a cathode ray tube. In fact it was this very possibility that prompted the inclusion of the new right of public display and section 109(b) exemptions.<sup>148</sup> Regardless of the scope of the subject matter to which a *droit de suite* might be applied, the principles that govern its development must be those that have evolved from the Follow Up and not the Gutenberg Model.

#### IV. CONCLUSION

Copyright law has failed to provide the visual artist with economic incentives fully equivalent to those of authors working in the literary and performing arts. As a result, few visual artists avail themselves of copyright. To correct this inequity, this Article has proposed that the

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precedent for placing the obligation for collecting the fee upon the seller for later distribution to the artist. Thus, the seller's role is much the same as the merchant who is required to collect sales tax from the buyer.

Although the proposed doctrinal basis would suggest the royalty should be paid by the buyer, it may, in fact, prove more workable to impose the liability for it on the seller. It is the seller whose identity is more readily ascertainable by the artist, and, after all, the seller's sale price should net out the same either way.

147. 17 U.S.C. § 109(a) (1982).

148. *Id.* § 109(b). Section 109(b) was primarily lobbied by the textbook manufacturers who feared that once educational institutions purchased a copy, they would "display" to numerous classes and many students through the use of electronic media thus destroying the market for texts.

With the growing use of projection equipment, closed and/open circuit television and computers for displaying images of textual and graphic material to 'audiences' or 'readers' this right is certain to assume great importance to copyright owners. A recognition of this potentiality is reflected in the proposal of book publishers and producers of audio-visual works which in effect would equate 'display' with 'reproduction' where the showing is for 'use in lieu of a copy.' The committee is aware that in the future electronic images may take the place of printed copies in some situations and has dealt with the problem by amendments in sections 109 and 110 . . . House Committee on Judiciary, Copyright Law Revision, House Rep. Report # 4347, 89th Cong., 2d Sess. (1966).

visual artist be granted both public and private display rights in his or her works.

Like their colleagues in the performing arts, visual artists must be granted a meaningful right to exploit economically the public use of the expression embodied in their works of art. Such a right is possible only if Congress recognizes that the present right of public display embodied in section 106(5) of the Copyright Act of 1976 is not based on a recognition of artists' natural right to exploit the aesthetic use of their works under the Follow Up Model but rather in an attempt to preserve traditional rights and ineffective incentives for the visual artist under the Gutenberg Model.

Accompanying the right of the artist to exploit economically aesthetic use of works of visual art by public institutions, federal copyright should incorporate a right of private display. The structure of such a right already exists in the form of the persistently misunderstood *droit de suite* where the compensable event of private display can be valued by the price at which a work of art is resold. The logic, and, indeed propriety of economic control over private display has long been recognized in the marketplace in those instances where economic interdependence of the negotiating parties provides the copyright proprietor with the power to render private display compensable. A private display right for the visual artist simply provides similar economic advantages where similar power is lacking.

In order best to reconcile both the artist's right to exploit economically the aesthetic use of his or her work of art with the owners' traditional property rights, the private and public display rights should be structured as compulsory licenses. The owner of the copy would maintain the right to determine when, where, and whether a copy will be displayed subject only to the copyright proprietor's right to a statutorily determined fee.

The authors recognize the assertion that artists' have an inherent right to control the expression embodied in their works renews the ancient debate as to the source of rights under copyright addressed in *Millar v. Taylor*,<sup>149</sup> *Donaldson v. Becket*,<sup>150</sup> and *Wheaton v. Peters*.<sup>151</sup> While many may consider the substance of that debate long settled,

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149. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

150. 4 Burr. 2408, 98 Eng. Rep. 257, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774).

151. 33 U.S. (8 Pet.) 591 (1834).

the writers suggest that the time is ripe to heed the words of Justice Oliver Wendell Holmes:

[T]he social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view.<sup>152</sup>

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152. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

99TH CONGRESS  
2D SESSION

# H. R. 4366

To amend title 17 of the United States Code to secure the rights of authors of pictorial, graphic, and sculptural works to the display of their works, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1986

Mr. DOWNEY of New York introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend title 17 of the United States Code to secure the rights of authors of pictorial, graphic, and sculptural works to the display of their works, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. EXCLUSIVE RIGHTS TO COPYRIGHTED WORKS.**

4       Section 106 of title 17, United States Code, is  
5       amended—

6               (1) by striking out "and" at the end of paragraph  
7       (4), by inserting "and" before "pantomimes" and by  
8       striking out "and pictorial, graphic, or sculptural  
9       works." in paragraph (5) and by striking out the period



1 at the end of paragraph (5) and inserting in lieu thereof  
2 “; and”; and

3 (2) by inserting at the end thereof the following  
4 new paragraph:

5 “(6) in the case of pictorial, graphic, or sculptural  
6 works, to display the copyrighted work.”.

7 **SEC. 2. SCOPE OF EXCLUSIVE RIGHTS.**

8 Section 113 of title 17, United States Code, is amended  
9 by inserting at the end thereof the following new subsections:

10 “(d)(1) Subject to the provisions of paragraphs (2) and  
11 (3), the exclusive right to display pictorial, graphic, or sculp-  
12 tural works under section 106(6) shall include both public and  
13 private display.

14 “(2) In the case of a pictorial, graphic, or sculptural  
15 work, the owner of a copyright work may display it publicly  
16 provided such display is in connection with a bona fide at-  
17 tempt to sell that copyrighted work.

18 “(3) In the case of a pictorial, graphic, or sculptural  
19 work, the owner of a copyrighted work may display it pri-  
20 vately provided such owner complies with subsection (e).

21 “(e)(1) Whenever a pictorial, graphic, or sculptural work  
22 is sold, the seller shall pay to the author of such work or to  
23 the author's agent a royalty. Such royalty shall be equal to 5  
24 percent of the sale price or of the fair market value of any  
25 property received in exchange. The right of the author to

1 receive this royalty may be waived only by a contract in  
2 writing providing for an amount in excess of this royalty. An  
3 author may assign the right to collect this royalty payment  
4 provided, however, such assignment shall not have the effect  
5 of creating a waiver prohibited by this subsection. If a seller  
6 fails to pay an author the royalty, the author may bring an  
7 action to recover the royalty within three years after the date  
8 of the sale or one year after the discovery of the sale, which-  
9 ever is longer. The court may award a reasonable attorney's  
10 fee to the prevailing party.

11       “(2) Paragraph (1) shall not apply to any of the  
12 following:

13           “(A) The initial sale of a work where legal title to  
14 such work at the time of such initial sale is vested in  
15 the author thereof.

16           “(B) The resale of a work for a gross sales price  
17 of less than \$1,000, or in exchange for property with a  
18 fair market value less than \$1,000.

19           “(C) The resale of a work for a gross sales price  
20 less than the purchase price paid by the seller.

21           “(D) The resale of a work by an art dealer to a  
22 purchaser within 10 years of the initial sale of the  
23 work by the author to an art dealer, provided all inter-  
24 vening resales are between art dealers. For the pur-  
25 pose of this subsection, an art dealer means a person

1 who is actively and principally engaged in or conduct-  
2 ing the business of selling pictorial, graphic, or sculp-  
3 tural works.

4 SEC. 3. ENFORCEMENT.

5 Except for an action brought under section 113(e)(1) of  
6 title 17 of the United States Code, no action may be brought  
7 to enforce any right under section 106(6) of such title until  
8 either ten years after the date of enactment of this Act or  
9 until an organization or organizations have come into exist-  
10 ence and been certified by any Federal District Court to rep-  
11 resent at least 25 percent of all living authors whose pictori-  
12 al, graphic, or sculptural works are on display in museums  
13 with annual operating budgets in excess of \$1,000,000,  
14 whichever occurs first. Such organization or organizations  
15 must be open for membership to any author of pictorial,  
16 graphic, or sculptural works which are on display under any  
17 circumstance. The term "represent" means, with respect to  
18 authors, to have taken from such authors assignments of their  
19 rights under section 106(6) of such title for the purpose of  
20 negotiating and enforcing those rights. Such organization or  
21 organizations shall, after deducting reasonable operating ex-  
22 penses, distribute all license fees collected to the authors rep-  
23 resented by them in an equitable manner.

# CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL

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ARTISTS' RIGHTS: THE KENNEDY PROPOSAL TO  
AMEND THE COPYRIGHT LAW

By  
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MARSHALL A. LEAFFER  
THOMAS M. GOETZL  
GILBERT S. EDELSON

### III. IN SUPPORT OF THE RESALE ROYALTY

THOMAS M. GOETZL\*\*\*\*\*

My objectives in this discussion are two-fold: first, to add some anecdotal color and detail to Professor Leaffer's analysis based on my work on the California Art Preservation Act<sup>142</sup> and on the Kennedy Bill;<sup>143</sup> and second, as an unrepentant, un-

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<sup>139</sup> 17 U.S.C. § 116 (1982 & Supp. V 1987).

<sup>140</sup> 17 U.S.C. § 119 (1982 & Supp. V 1987).

<sup>141</sup> See *supra* note 16.

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<sup>142</sup> California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

<sup>143</sup> Visual Artists Rights Act, *supra* note 2. This bill with minor exceptions is identical to S. 2796, 99th Cong., 2d Sess. (1986). "The Visual Artists Rights Amendment of 1986." These are not the first attempts to introduce legislation in Congress providing for payment of a royalty on the resale of their works. In 1978, Congressman H. Waxman of California introduced H.R. 11403, 95th Cong., 2d Sess. (1978). This writer was an invited conferee at the discussion conference called by Congressman Waxman.

abashed supporter of the resale royalty, to present some arguments in its defense which may persuade some of you to join me in its advocacy.

I was privileged to testify at the first Kennedy Bill hearing in November, 1986, at the Cooper Union in New York City.<sup>144</sup> Among the other witnesses who testified was Alfred Crimi. All of us who have taught Law and the Arts have had occasion to read *Crimi v. Rutgers Presbyterian Church*.<sup>145</sup> Crimi's 800 square foot fresco, which was commissioned for the chancel of the Rutgers Presbyterian Church in Manhattan, had been printed in 1938. Its destruction eight years later stunned the artist, provoking his lawsuit.<sup>146</sup> Alfred Crimi, now an elderly man, fairly shook with anger as his testimony caused him to recall the trauma he suffered at that time. Whenever I reread that opinion, I envision a Daumier caricature of a judge peering down from on high at Crimi, who is a rather diminutive man, shaking his finger and scolding him. Because Crimi, a Sicilian emigrant, had looked to Continental law for examples of moral rights to support his case. I imagine the judge admonishing Crimi to go back where he came from if he didn't like our laws. And on the other hand, I hear the judge lecturing Crimi that had he been so concerned about protecting his art work, he should have so provided in his contract with the church.<sup>147</sup> It was apparent from his testimony at the Kennedy Bill hearing that Crimi enthusiastically supports both the California Act and the Kennedy Bill.

In addition to Crimi's eloquent and emotional testimony, other witnesses testified regarding both the moral rights<sup>148</sup> and the copyright notice<sup>149</sup> provisions of the Kennedy Bill. I was the only witness to present testimony directed to the resale royalty right<sup>150</sup> provisions. The 99th Congress closed with no action having been taken on the Kennedy Bill.

The Kennedy Bill was reintroduced in the 100th Congress, and in December of 1987 another hearing was held in Washington, D.C.<sup>151</sup> Due primarily to the distance and resulting expense,

<sup>144</sup> Visual Artists Rights Act of 1986. *Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 2d Sess. (1986) [hereinafter 1986 Hearing].

<sup>145</sup> 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). See *supra* notes 54-62 and accompanying text.

<sup>146</sup> A. CRIMI, *A LOOK BACK — A STEP FORWARD: MY LIFE STORY* 138-166 (1988).

<sup>147</sup> *Id.* at 576-77, 89 N.Y.S.2d at 819.

<sup>148</sup> Visual Artists Rights Act, *supra* note 2, § 3.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See generally *Hearings on S. 1619*, *supra* note 6.



both the 1986 New York Hearing and the 1987 Washington, D.C. Hearing included very few witnesses from the West.<sup>152</sup> This is despite the fact that California alone has experience under the resale royalty law,<sup>153</sup> and pioneered the art preservation law<sup>154</sup> protecting the moral rights of artists. If the subcommittee had really wanted an accurate picture of the operation of these laws, it should have heard more from the arts community which is affected by and directly benefiting from them.

Professor Leaffer referred to the impact of the recently enacted Berne Convention Implementation Act of 1988<sup>155</sup> upon the copyright notice provision of the Kennedy Bill.<sup>156</sup> Although the Berne Act is more a response to the commercial needs of the communication/information industry than to the wishes of the artistic community, I think it safe to conclude that the Berne Act,<sup>157</sup> as a practical matter, has removed the incentive to retain the copyright notice provision of the Kennedy Bill.<sup>158</sup>

I would like to add a couple of background anecdotes with respect to the moral rights provisions.<sup>159</sup> The California Art Preservation Act makes special provision for works of art which cannot be removed from a building without alteration or destruction.<sup>160</sup> The original drafts of the bill for that Act had included no

<sup>152</sup> In fact, at the 1986 Congressional Hearings, the author was the only witness from west of Washington, D.C. 1986 Hearing, *supra* note 144. The 1987 Hearings included only two witnesses from California. Hearings on S. 1619, *supra* note 6.

<sup>153</sup> CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

<sup>154</sup> *Id.* §§ 987, 989.

<sup>155</sup> Berne Implementation Act, *supra* note 37.

<sup>156</sup> Kennedy Bill, *supra* note 34, § 2.

<sup>157</sup> Berne Convention, Paris Act, *supra* note 84, § 2.

<sup>158</sup> Kennedy Bill, *supra* note 34. During the last Congress, Rep. Kastenmeier began to circulate a draft substitute for H.R. 3221 (the House counterpart to S. 1619) in which the copyright notice provision had been eliminated. *Id.*

<sup>159</sup> *Id.* at § 3.

<sup>160</sup> The California Art Preservation Act reads in part:

(h) *Removal from building; waiver.* (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived. Such instrument, if properly recorded, shall be binding on subsequent owners of such building.

(2) If the owner of a building wishes to remove a work of fine art which is a part of such building but which can be removed from the building without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If such work is removed at the

such provision.<sup>161</sup> Those of us working with California State Senator Alan Sieroty, the bill's sponsor, speculated about who its opponents might be: perhaps collectors whose traditional property rights would be compromised, or dealers acting on behalf of those collectors. We were surprised to learn that there would be opposition from the very powerful real estate industry.

Meetings with industry representatives quickly disclosed their concerns. If there were an absolute prohibition on the destruction of works of art, then an owner or buyer of real estate with artwork attached to it would be precluded from demolishing or remodeling that building unless the artist had waived his rights.<sup>162</sup> To address these objections, negotiations were conducted which resulted in the adoption of language to accommodate this concern.<sup>163</sup> Similar language is included in the Kennedy bill.<sup>164</sup>

Interestingly, the California statute makes it clear that only *constructive* notice will suffice.<sup>165</sup> If the instrument has not been recorded, then neither actual notice or inquiry notice will work. Again, the Kennedy Bill has retained this feature.<sup>166</sup>

Professor Leaffer also referred to the fact that the California Art Preservation Act and the Kennedy Bill require protected art to be of "recognized quality"<sup>167</sup> and "recognized stature,"<sup>168</sup> respectively. Presumably, the intended meaning is the same. This

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expense of the artist, his heir, legatee, or personal representative, title to such fine art shall pass to that person. CAL. CIV. CODE § 987(h) (West 1987 & Supp. 1989).

<sup>161</sup> See California Bill SB 2143, one of the forerunners to CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

<sup>162</sup> See CAL. CIV. CODE § 987 (g)(3) (West 1982 & Supp. 1989), which reads in relevant part, "[T]he rights and duties created under this section . . . [e]xcept as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist."

<sup>163</sup> SB 2143 (1978) section 1 (e)(4)-(5) and SB 668 (1979) section 1(h), provide essentially that the artist's right of integrity is deemed waived unless the owner of the building to which it is attached signs and records an agreement preserving that right. Interestingly, the California statute makes it quite clear that it is only *constructive notice* that will suffice. CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989). "[R]ights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived." *Id.*

<sup>164</sup> Kennedy Bill, *supra* note 34, § 4.

<sup>165</sup> California Art Preservation Act, CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989) ("... unless . . . properly recorded, shall be deemed waived").

<sup>166</sup> Kennedy Bill, *supra* note 34, § 4.

<sup>167</sup> CAL. CIV. CODE §§ 987(b)(2), 987(f) (West 1982 & Supp. 1989).

(b)(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(f) *Determination of recognized quality.* In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of

qualifying language was added in response to critics who expressed concern that frivolous claims might be brought regarding art work that did not merit protection. At the California State Senate Committee Hearing in the summer of 1978, which was prior to the adoption of the "recognized quality" language, one committee member objected to the Bill, expressing concern that a kindergarten teacher might tear up a child's finger painting and then be sued for the destruction of that work of art.<sup>169</sup>

In response, it was pointed out that in no other context is a plaintiff required to establish that damaged property was of any particular "quality" or "stature" in order to state a cause of action.<sup>170</sup> Furthermore, practical economics assure that frivolous lawsuits are not often pursued.<sup>171</sup> Accordingly, I would urge that that language be omitted from the Kennedy Bill since it unnecessarily increases the plaintiff-artist's burden and invites a subjective determination of what constitutes "recognized stature."<sup>172</sup>

One thorough examination of current moral rights case law concludes that adequate protection for an artists right of integrity would evolve even without statutes.<sup>173</sup> In contrast, Peter Karlen, a well known attorney in the area of moral rights disputes,<sup>174</sup> suggests that while common law theories may suffice for the academician, he attributes his success in this area to the existence of the California Art Preservation Act. By simply writing to the offending collector, which is often a governmental entity or a corporation,<sup>175</sup> and pointing to the relevant language of the Act which prohibits a particular practice, Karlen generally gets imme-

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artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art. *Id.*

<sup>168</sup> Kennedy Bill, *supra* note 34, § 2. See *supra* note 115.

<sup>169</sup> Richard Mayer, Vice President of Artists Equity Association, Inc. and a prominent art activist, who testified at the Hearing, related this debate to the author. The California Legislature retains no official transcript of the Hearings.

<sup>170</sup> *Id.*

<sup>171</sup> Victims who suffer only insignificant harms are seldom willing to incur litigation expenses. Moreover, lawyers are not likely to accept such cases on a contingent fee basis.

<sup>172</sup> Plaintiff must secure testimony of experts to establish the work of art involved was of "recognized stature." See *supra* note 115, at 166-67. In California, it is possible that plaintiff could recover those expert witness fees. See CAL. CIV. CODE § 987(e)(4) (West 1982 & Supp. 1989).

<sup>173</sup> Damich, *The Right of Personality: A Basis for the Protection of the Moral Rights of Authors Common Law*, 23 GA. L. REV. 1 (1988).

<sup>174</sup> See, e.g., Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675 (1982).

<sup>175</sup> These are the owners most likely to mutilate or destroy art. Individual collectors are far more likely to protect their own self-interest and refrain from such vandalism. Recall, for example, the fate of Crimi's fresco, *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S. 2d 813 (Sup. Ct. 1949), as well as Alexander Calder's mobile, mutilated by the Allegheny County Airport Commission, ARTNEWS, Jan. 1978, at 39. Richard Serra's *Tilted Arc*, threatened by the G.S.A., and Isamu Noguchi's sculpture,

diate results. Indeed, the very dearth of reported cases echoes the success of this statute. Even in cases where the harm has already occurred, all that remains is to negotiate a settlement of the artist's claim for damages to his reputation.

The immediate issue is what form the Kennedy Bill will take in the upcoming 101st Congress. Clearly, the moral rights provisions will continue to be the heart of the Bill. Although the writer is still committed to supporting the Bill, he does not feel the same urgency about the moral rights provisions as about the resale royalty provisions. Nine states,<sup>176</sup> plus California, have now enacted moral rights legislation. Together with California, these states are home to one-third of the nation's population and the majority of the nation's important art markets. Nevertheless, there are compelling reasons to welcome federal legislation on the subject. First, federal legislation would afford artists protection in the remaining forty states. Second, it would provide a minimum level of uniformity throughout the country.<sup>177</sup> Finally, this legislation would reduce potentially troublesome choice-of-law/conflict-of-law issues.<sup>178</sup>

I would like to turn the focus to the resale royalty right provisions of the Kennedy Bill. As Professor Leaffer previously indicated, the version which was conditionally voted out of the Subcommittee on Patents, Copyrights and Trademarks on August 10, 1988, deleted the resale royalty right altogether.<sup>179</sup> In its place was a requirement that the National Endowment for the Arts, in cooperation with the Copyright Office of the Library of Congress, conduct a study to analyze the feasibility of enabling artists to participate in the economic exploitation of their work even after it has been sold.<sup>180</sup> A report is to be submitted to the Congress within twelve months of the effective date of this legislation.

I am eager to restore the resale royalty right provisions to the Kennedy Bill—and not just in reaction to the recent, highly

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destroyed by the Bank of Tokyo in New York. ARTNEWS, May 1988, at 143. See generally *supra* notes 58-67 and accompanying text.

<sup>176</sup> See *supra* note 16.

<sup>177</sup> See § 9 of the Discussion Draft containing an Amendment in the nature of a substitute to S. 1619 providing there would *not* be preemption of state laws to the extent such provided the same or additional rights and protection. This very important provision was insisted upon by Artists Equity Association, Inc. to insure that no gains won in particular states would be forfeited in the effort to federalize the *droit moral*.

<sup>178</sup> *Id.*

<sup>179</sup> Kennedy Bill, *supra* note 34.

<sup>180</sup> *Id.* at § 8(a).

publicized resale of a Jasper Johns painting for \$17.1 million.<sup>181</sup> Rather, it is because fundamental fairness requires Congress to treat visual artists on a par with other creative persons.<sup>182</sup>

Ever since the California Resale Royalty Act went into effect twelve years ago,<sup>183</sup> it has generated enormous challenge, controversy and criticism.<sup>184</sup> Interestingly, there is persistent controversy about whether or not the California statute works. It is consistently referred to in the literature as being neglected, underused, even moribund.<sup>185</sup> There is, however, no reliable official source of information on the frequency or amount of art being resold.<sup>186</sup> Opponents and supporters must therefore rely upon anecdotal evidence of whether resale royalties have been paid. Opponents will occasionally refer to instances in which resale royalties were not paid, but requests for documentation inevitably go unanswered. On the other hand, in my capacity as an arts advocate and as a longtime board member of the California Lawyers for the Arts, I hear of countless royalties paid to many artists. Although some lawsuits have been filed to collect resale royalties, there are no reported opinions.<sup>187</sup> The law is clear

<sup>181</sup> Wall St. J., Nov. 28, 1988, at 1, col. 6. The original sale of this work (perhaps aptly titled "False Start") earned Johns less than \$2,000. In the same month, five other paintings by contemporary American artists resold at prices in excess of four million dollars each. *Id.* It is no longer the long dead artists whose works resale for astronomical prices. A Picasso just sold at auction in New York for 47.85 million dollars. N.Y. Times, May 10, 1989, at C21, col. 1.

<sup>182</sup> Whether the resale royalty should be measured by five percent of the gross resale price, as it is in California, or by seven percent of the appreciation, as it was in the 1987 version of the Kennedy Bill, is beyond the scope of this discussion. See CAL. CIV. CODE § 986(a) (West 1982 & Supp. 1989). Visual Artists Rights Act, *supra* note 2, § 3(d).

<sup>183</sup> California Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

<sup>184</sup> To no avail this challenge assumed constitutional proportions in *Morseberg v. Balyon*, 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (unsuccessful constitutional challenge under the copyright clause, U.S. CONST. art. 1, § 8, cl. 8, the contract clause, U.S. CONST. art. 1, § 10, cl. 1, and the due process clause, U.S. CONST. amends. V, XIV). Although the preemption issue was tested under the 1909 Copyright Act, the absence of subsequent constitutional challenges on this ground suggests concession that the same outcome would probably still be reached under the 1976 Copyright Revision Act.

<sup>185</sup> See, e.g., McInerney, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 3 (1984); Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK. L. REV. 1, 3 (1988) [hereinafter Siegel].

<sup>186</sup> One survey, conducted in December 1986 by the Bay Area Lawyers for the Arts ("BALA"), was based upon a very small return confined to the San Francisco area. While it disclosed some knowledge, use, and general approval of the resale royalty, the survey itself was based on too small a sampling to be definitive. See Robinson, *BALA Survey Artists and Galleries on Resale Royalties*, BALA GRAM, NOV./DEC. 1986, at 1, *reprinted in Hearings on S. 1619*, *supra* note 6 at 119.

<sup>187</sup> A number of documented settlements exists in the author's files. Such cases are generally heard in small claims court or promptly settled.



enough.<sup>188</sup> That some may fail to comply with the law hardly proves the law is ineffective, as some critics have charged; it merely shows that it cannot be perfectly enforced. However, few, if any, laws can be.

A recent article characterizes supporters of the resale royalty as holding a romantic view of the artist.<sup>189</sup> That is not accurate.<sup>190</sup> Advocates of the resale royalty simply want equity for artists vis-a-vis other creators. It is an appeal to fairness.<sup>191</sup> Recall, if you will, that copyright law began with books and copies. Gradually, new subject matter has been added to the copyright law.<sup>192</sup> And, over the course of time, in response to lobbying efforts, new exclusive rights have been added.<sup>193</sup> The common theme seems to be a desire by Congress, pursuant to Constitutional authorization,<sup>194</sup> to assure that those who have created intellectual property can benefit economically from the use of their creations for the term allowed.<sup>195</sup> Songwriters and lyricists, for example are entitled to royalties whenever their compositions are broadcast on the radio<sup>196</sup> or, now, played on a jukebox.<sup>197</sup> And

<sup>188</sup> All an artist need do is establish that there was a resale and that the threshold requirements were met. See CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

<sup>189</sup> Siegel, *supra* note 185, at 4.

<sup>190</sup> The French justify their *droit de suite* on the rationale that where there has been a major increase in the value of a work of art, it must be primarily attributable to the continuing efforts of the artist who created it to enhance his artistic talent and reputation. Goetzl & Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J.L. & ARTS 15, 39 n.89 (1984). The German rationale (perhaps it is a bit romantic) is that the true value of the art was always inherent in the work. At the time of the first sale, the public lagged far behind in its taste and understanding because it failed to appreciate the full value of the work. Only later, when the public taste has matured and the art work has attained its true value, must the artist be allowed to share in that higher resale price. *Id.*

<sup>191</sup> See *id.* at 48-51 and accompanying text for a detailed exposition of this view.

<sup>192</sup> See 17 U.S.C. §§ 101-02 (1982 & Supp. V 1987). A definition for "computer program" was added in 1980. *Id.* § 101. In 1976, Congress explained the works of authorship list in section 102. *Id.* § 102.

<sup>193</sup> See, e.g., 17 U.S.C. §§ 106-18 (1982 & Supp. V 1987). Sections 107 through 118 are exceptions, limitations, and the scope that Congress has placed on the copyright owners' exclusive rights granted in section 106. *Id.*

<sup>194</sup> U.S. CONST. art. I, § 8. "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

<sup>195</sup> See generally 17 U.S.C. §§ 302-05 (1982 & Supp. V 1987), which define the duration of the copyright for works created before and after January 1, 1978, as well as the terminal date applicable to all terms of copyright.

<sup>196</sup> 17 U.S.C. § 106(4) (1982 & Supp. V 1987). See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

<sup>197</sup> 17 U.S.C. §§ 106(4), 116 (1982 & Supp. IV 1986). Section 106(4) gives the copyright owner "exclusive rights" over any public performance of the copyrighted work. *Id.* Section 116 limits the liability section of § 106(4) in the case of "nondramatic musical work embodied in a phonorecord," when the work is in a coin-operated phonorecord player. *Id.* at § 116(a). See, e.g., *Broadcast Music, Inc. v. Xanthas, Inc.*, 674 F. Supp. 333 (E.D. La. 1987), modified, 855 F.2d 233 (5th Cir. 1988) (summary judgment against juke-



that entitlement exists in addition to any royalties to which they may be entitled from the sale of sheet music and records.<sup>198</sup> Authors are entitled to royalties not only from sales of copies of their books,<sup>199</sup> but also from the sale of film rights.<sup>200</sup> And the film rights belong to the author even though it is rare that a book will be made into a film. So to criticize the resale royalty by pointing out that only a small percentage of art work will ever be resold at a higher price misses the point. The resale royalty is an economic right and artists whose works sell in a secondary market ought to benefit from that sale.

Some have charged that it is simply unnecessary to have a statute granting a resale royalty right. They argue that an artist who wishes to have such a right should simply include it in the original sales contract. That is what Crimi was told.<sup>201</sup> Few artists, however, anticipate this need and, fewer yet have the bargaining power to meet it. The Projansky Contract<sup>202</sup> has been around for two decades. Although it is well drafted, few artists have successfully persuaded collectors to sign it. Critics describe the non-waivability<sup>203</sup> of the resale royalty right as unnecessarily patronizing. However, legislation which seeks to protect a class of people who generally lack proportionate negotiating power often provides non-waivable rights.<sup>204</sup>

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box owner/operator for multiple violations of Copyright Act, damages equal to three times the amount of unpaid registration fees).

<sup>198</sup> 17 U.S.C. § 106(1), (3)(1982 & Supp. V 1987). *See, e.g.*, *Interstate Hotel Co. of Nebraska v. Remick Music Corp.*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947)(copyright holders awarded injunction and damages for defendant's public performance of compositions without license or consent despite defendant's public purchase of sheet music).

<sup>199</sup> *See, e.g.*, *Shapiro, Bernstein & Co. v. Bleeker*, 224 F. Supp. 595 (S.D. Cal. 1963) (plaintiff has burden to show actual damage suffered or defendant's profits resulting from book published with 1,000 separate righthand melodies, twelve of which belonged to plaintiff).

<sup>200</sup> 17 U.S.C. § 106(2)(1982) (allows owners of copyright to "prepare derivative works based upon the copyrighted work"). *See, e.g.*, *National Business List v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982)(unauthorized use of credit bureau's mailing list constituted copyright infringement).

<sup>201</sup> *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949), discussed *supra* notes 38-63 and accompanying text.

<sup>202</sup> ART LAW, *supra* note 12, app. 24, at 1131.

<sup>203</sup> *See* CAL. CIV. CODE § 986(a)(West 1982). "The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent." *Id.*

<sup>204</sup> Consider, for example, statutes providing rights for such diverse classes as tenants, consumers, patients and, mobile home buyers. *See, e.g.*, CAL. CIV. CODE §§ 1942.1, 3097 (West 1982 & Supp. 1989); CAL. HEALTH & SAFETY CODE §§ 1430, 1599.81, and 18039 (West 1982 & Supp. 1989), respectively. Section 18039 provides: "No agreement entered into pursuant to this chapter shall contain any provision by which the buyer waives his or her rights under this chapter, and any waiver shall be deemed contrary to public policy and shall be void and unenforceable." *Id.* at § 18039

It is frequently alleged that the resale royalty has failed to accomplish its purpose of providing money for poor artists. Again, the argument is misdirected. The resale royalty was never intended as welfare legislation. No one has ever dared intimate that other rights granted by the copyright law are ineffective because they fail to provide royalties, for example, to poor street musicians or to poor, unpublished authors. Nor is patent law attacked for failing to assure royalties to inventors whose inventions never find a market. Visual artists should be treated like other creative people.

What the resale royalty right can do is assist undiscovered artists who, early in their careers, are required by economic exigencies to sell their works at prices which hardly recoup their out-of-pocket production costs. The resale royalty right offers such artists the prospect of making some money in the future from those works.

Critics also assail the resale royalty right for allegedly damaging the art market. They insist that fewer than one-tenth of one percent of art works ever find a secondary market. At the same time, however, they claim that a dealer's ability to subsidize young undiscovered artists occurs through the backroom resales of works by established artists.<sup>205</sup>

One scenario, which I would find more entertaining had it not been so seriously proposed, had would-be collectors using complicated equations to calculate prices at which they would purchase art.<sup>206</sup> These "investment-minded collectors" would attempt to discount the price quoted in order to compensate for the amount potentially owed under the resale royalty provision. That is not, however, what happens in the real world.<sup>207</sup> A resale royalty that has only a remote possibility of becoming payable at some later date is hardly likely to affect the purchase price.

Such investment-minded collectors would most probably be

<sup>205</sup> Bolch, Damon & Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689, 696 (1978) [hereinafter Bolch, Damon & Hinshaw]. A 1980 study suggested that the resales of works by just five artists—Robert Rauschenberg, Jasper Johns, Frank Stella, William de Kooning, and Alexander Calder—accounted for over one third of the dollar volume of all resales. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y. 146, 153 (1980).

<sup>206</sup> Bolch, Damon & Hinshaw, *supra* note 205, at 697.

<sup>207</sup> Art generally changes hands at prices stated in round numbers. Furthermore, the equations they would have to apply must properly include several variables, only one of which—the resale royalty percentage—can be predicted. Other variables which should be taken into account might include the amount of a dealer's commission on a resale, the rate at which income taxes might be assessed on any gains, the rate of inflation, and (especially) whether the work will have a secondary market at all at an appreciated price, and under circumstances where a resale royalty statute will apply to the transaction.

holly unwilling to buy the art of *any* artist without an established resale market. Indeed, such an analysis totally ignores what Professor DuBoff has aptly identified as the "psychic dividend"<sup>208</sup> or the pleasure of owning a work of art.

A resale royalty right is not going to drive collectors away from the purchase of contemporary art, as has often been charged. At the turn of the century, when Congress was considering legislation to grant composers a public performance for profit right, the infant radio industries protested. They claimed that an obligation to pay a royalty every time they played contemporary copyrighted music would compel them to confine their repertoire to classical music already in the public domain. Well, spin the dial on the radio; that is not what is happening. There has always been a market for contemporary music. There will always be a market for contemporary art. The resale royalty right will not affect that.

Finally, I want to respond to the "unfairness" argument. It is said by some that, for example, it would be unnecessarily avaricious for Jasper Johns<sup>209</sup> to seek a royalty upon the resale of his \$17.1 million painting (\$850,000 at 5%). Rather, he should be grateful because now Leo Castelli, his dealer, can, and has announced that he will,<sup>210</sup> raise the prices on Jasper Johns' new works. Why should artists be the only socialists in this capitalist society? If they are successful, why shouldn't they get richer just like anyone else? Imagine calling up Irving Berlin after having broadcast an hour-long concert of his music, and telling him he should be grateful for the exposure. Now he'll sell more sheet music and records, and, after all, he has all the money a centenarian could possibly need. No, it is *his* music and he is entitled to be paid for the broadcasting of his music. And so too, why shouldn't a collector be required to pay the artist a royalty for the ongoing enjoyment of his work (the very existence of a secondary market in which to sell the work).

In summary, fundamental fairness and opportunity to harvest equal economic rewards from the variety of ways by which one's creativity is exploited under the authority of the Copyright

<sup>208</sup> ART LAW, *supra* note 12, at 364. DuBoff analogizes the investment in art to investment in financial markets. Instead of receiving a dividend as a percentage return on invested capital, the investor receives what DuBoff terms a "psychic dividend," — the investor can measure the value of his investment in terms of its aesthetic appeal. If that dividend should begin to decrease, he may desire to sell the work and purchase another. *Id.*

<sup>209</sup> The author does not ascribe any particular position to Jasper Johns personally.

<sup>210</sup> Wall St. J., Nov. 28, 1988, at 1, col. 6. *See supra* note 181 and accompanying text.

Clause of the United States Constitution should compel Congress to provide visual artists with a right to resale royalty. I hope some of you will join me in the effort to persuade our elected representatives to restore the resale royalty provision to the Kennedy Bill when it is reintroduced in the 101st Congress this year.



## Société des auteurs dans les arts graphiques et plastiques

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May 2nd, 1991

Mr. William PATRY  
Policy Planning Advisor  
to the Registrar of Copyrights  
COPYRIGHT OFFICE  
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(Room 403)  
Independence Av., S.E.  
WASHINGTON, D.C. 20559  
U.S.A.

RE: Notice of Inquiry on Resale Royalty Rights

Comment Letter

RM 91-1

No. 16


Dear Mr. Patry,

Please find enclosed herewith ADAGP's report on the inquiry made about resale royalty right.

We are also enclosing some documentation concerning our society and our list of members (among them Alechinsky, Arman, Basquiat, Boltanski, Braque, James Brown, Buren, Chagall, Dali, Miro, Tàpies, Venet...).

Actually we are the first society in the world for the defence of authors' rights and especially for the collection of resale royalties as we collected 52.000.000 French francs (i.e. US\$ 8.600.000) in 1990.

We remain at your disposal for any further information you may require. We are ready to meet with you in Washington, if need be, at your convenience.

  
Jean-Marc GUTTON  
General Manager

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Président : Jean Feugereux

## Study on Resale Royalties for Works of Art

### Notice of Inquiry

1. Would resale royalty legislation promote or discourage the creation of new works of art, and if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?

According to ADAGP, the resale royalty legislation does not have any influence on the level of creation of new works of art as creation is generally independent of any economical criterion in the field of graphic and plastic arts.

It is obvious, however, that, since it represents a substantial income for the authors, the latter cannot fail to be encouraged by this law which allows them to benefit fairly from the increase of value on their works.

The marketplace for works of art subject to such a requirement is not much affected. The most important auction houses in United Kingdom, Switzerland or the Netherlands, where this law does not exist, do not obtain a turnover very much higher in this field than France or Germany. The art market in France which has thrived over the last few years has never been adversely affected by this law (tripled value of auction sales). The main point is that a marketplace should be a centre of creation which is the case of France and especially Paris.

2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured: by a percentage of the resaler's profit, the net sales differential, or some other measurement? Should the net sale differential be adjusted for inflation?

The works of art which should benefit from this legislation are all works of graphic and plastic arts and photographs including works made in several copies if the art market considers them as original works.

A threshold value should be provided in order to avoid too complicated administration for very small amounts.

This threshold could be about US\$200.

It is not desirable that a threshold increase in value exists for the application of the resale royalty as this would imply that the buying price would be known each time but this is not possible in most cases.



The resale royalty should be calculated on a percentage basis on the salesprice of the work without any deduction and should concern public and private sales (In Europe it fluctuates between 6% in Portugal and 2% in Spain).

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?

The requirement should benefit to all works, being created or not in the United States.

If not, the foreign artists would be unjustly penalized and the American artists could only benefit from this law for the works created in the countries which apply resale royalty.

That would be in contradiction with the provisions of the Bern Convention to which the US now belongs.

In France, French artists can benefit from the resale royalty in all countries which apply such a law, just as the foreign artists originating from these countries can benefit in France from the resale royalty without any formality.

For foreign artists who have lived for at least 5 years in France, even not consecutively, a specific demand for assimilation can be sent to the Ministry of Culture to allow these artists to benefit from this right.

4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?

The term of the resale requirement should be the same as for other authors' rights, i.e. 50 years after the death of the author and be descendible.

It should be applied to all works still protected in the country of origin at the date of enactment of the legislation.

5) Should there be any enforcement mechanisms, central collecting societies or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated or exchanged in a barter transaction?

This right should be administrated by an authors' society (in the US: ARS, Artists Rights Society in New York) as it is in all the countries where this right exists.

No registration would be necessary.

The law should provide however that the sellers (or their intermediaries: auctioneers, galleries, brokers...) should inform the authors' society before the sale in order to allow the society to claim resale royalty and after the sale they should inform the society of the salesprice. This entails very little management, and has functioned in our country for many years without causing any difficulties. Penalties should be provided for infringements.

6) Should the right be waivable or alienable?

This right should not be waivable or alienable in order to avoid pressure being put on the Artists by the sellers.

7) Should the California law be preempted in the event of a federal law?

The law of California is very restrictive for its beneficiaries. We hope that the scope of federal legislation would be more widely protective.

We would like to add some comments on the French situation:

As you may know, the resale royalty requirement was already introduced in the law of 1920. Thus, we have a long experience in this field.

The royalty amounts to 3% of the salesprice of the auctioned works.

The amounts collected by ADAGP increased from FF 13.000.000 (US\$ 2.350.000) in 1988 to FF 52.000.000 (US\$ 9.400.000) in 1990, which shows that the art market was not penalized by the existence of this right.

Of the 2,500 artists directly represented by ADAGP, more than 1,600 received payments last year and this right represents an important source of income for many of them.

It is therefore a right which widely benefits unknown artists, even if the important sales concern only few of them.

Comment Letter	
RM	91-1
No. _____	

**EVA: Answers to the Questionnaire  
on Droit de Suite in the European Community**

- 1. Does it seem to you necessary that the Member States' provisions on droit de suite be harmonized at the Community level?**

**Answer:**

For artists engaged in the fine arts droit de suite is one of the most important authors rights.

Unlike authors of other kinds of work who draw in many ways economic benefit from public performance and mechanical or other reproduction of their works, these artists can sell their original works only once. Droit de suite considers the special value the original work has on the art market and thus enables artists, too, to benefit from the increase in the value of their works.

The fact that droit de suite has not yet been introduced in all Member States of the Community affects the living conditions of artists living in those countries that do not recognize this right.

Artists engaged in fine arts are underprivileged compared to authors of literature and music, for example, because the authors rights of the latter exist in all Member States of the Community or because important exploitation rights benefitting those authors in particular are just being harmonized at Community level (c. private reproduction, cable and satellite networks).

The present situation also affects art dealers. It is true that droit de suite is only one factor that goes into the market price of a piece of art. Nevertheless, the fact that droit de suite does not exist in all Member States brings about distortions of markets and competition.

2. Please indicate, in respect of the last ten years, the amounts collected annually under droit de suite, broken down if possible according to the nature of the work and by beneficiary.

Answer:

The following table shows the 1981 - 1990 revenues from those countries of the Community that do recognize droit de suite.

- In 1.000 ECU\* -

Year	F	D	B1)	DK2)	E3)
1981	338	182			
1982	347	404			
1983	674	427			
1984	657	365			
1985	711	553			
1986	1.110	582			
1987	1.571	885			
1988	3.105	895			
1989	6.727	1.403			
1990	11.871	2.155	189	223	
1991					31

\* 1 ECU = FF 7,0; FB 42,3; DK 7,9; Pts 129; DM 2,05

- 1) It is impossible to obtain any information on collection by the state. The only information available is on the copyright collecting society SABAM. The indications are therefore estimates.
- 2) Revenues from the second half of 1990, the first collection period after the introduction of the law.
- 3) For comparison: Revenues from the first half of 1991, the first collection period after the introduction of the law.

For technical reasons it is not possible to give details on the distribution of revenues by copyright collecting societies.

Beneficiaries of revenues, however, are not only living artists and their heirs. Certain percentages of the revenues are also used - in accordance with distribution plans of the copyright collecting societies - in many ways in the social field and to support young artists.

Any future EC directive should recommend such use of a part of the revenue to benefit the community of artists.

3. Which types of article are covered by droit de suite (fine arts of all descriptions, photographic works ...)? How should the term "original work" be defined in this context?

Answer:

Droit de suite should be applicable to all works of fine art - paintings, drawings, original prints, lithographs, sculptures and tapestries.

Photographs, if they are of relevance to the art market, should also be covered by droit de suite.

Works of applied art should be covered by droit de suite as far as they enjoy the protection of copyright legislation. The definition of the term original work should be left to national legislation and jurisdiction or to art dealers and copyright collecting societies to find an agreement as far as the art market is concerned. It will not be necessary to include any definition into the process of harmonization.

4. To which types of sale should the droit de suite apply?

Answer:

Droit de suite should apply to all cases where pieces of art are resold or bartered through art dealers or auctioneers acting as buyers, sellers or agents.

5. Please indicate what, in your opinion, should be the basis, the rate(s) and the minimum threshold of applicability of droit de suite.

Answer:

Droit de suite should be part of national copyright legislation.

Rates should be calculated on the resale price regardless of profit margins.

Rates should be paid by the seller.

The minimum threshold of applicability should be 150 ECU.

5. Should droit de suite be the subject of collective management?

Answer:

We join the WIPO in their recommendation. Only collective management through a copyright collecting society guarantees satisfactory management of droit de suite.

Experience shows that individual management is difficult just because it is difficult to obtain the necessary information and assert claims against parties unwilling to perform.

7. In your experience what are the aspects of droit de suite which present particular difficulties in respect of implementation? Please give reasons.

Answer:

Problems in implementing droit de suite arise especially when copyright collecting societies and holders of interests are refused the information they need to assert their claims.

Therefore, a directive should follow examples in various Member States and include the seller's obligation to transfer all necessary information on works of art he sells as well as selling prices to a copyright collecting society. Such a directive should also prescribe sanctions to help assert claims.

8. If droit de suite were to be introduced in the Community, would it be necessary for there to be measures aimed at preventing sales from being displaced to other countries which do not recognize such a right? At what rate of levy of the droit de suite do you think the risk of evasion will become significant?

Answer:

We do not think that any important changes will occur on the art market when droit de suite is introduced in all Member States.



The European economic space of art trade will be strong and attractive enough to support droit de suite. What is more, any displacement of markets would entail great expense.

In addition, as is well known, a couple of countries that are not members of the EC have plans to introduce droit de suite as well. Even the United States are considering this step. Under such conditions a displacement of markets would be useless.

Experience with the introduction of droit de suite in individual Member States confirms that art trade stays in its traditional locations and environments. As far as we know, neither Germany nor Denmark or Spain have seen displacements of any importance.

We therefore think that there will be no need for particular measures against displacement.

9. Which artists should benefit from the droit de suite (EC nationals, third country nationals living in the Community, others)? More generally, how should the reciprocity provision in Article 14ter of the Berne Convention be applied?

Answer:

All artists who are citizens or inhabitants of a Member State should most certainly benefit from droit de suite. Third country nations should benefit only on the basis of reciprocity in accordance with Article 14ter of the Berne Convention.

States should participate only under the condition of reciprocity in accordance with Article 14ter of the Berne Convention.

We are convinced that such regulations would encourage third countries to make droit de suite available to their artists as well.

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1. We have the impression that resale royalties encourage the creation of new works as living artists, who many times are out of the market because of changements of the public taste within short terms get support from the resale royalty in order to continue with their artistic work. In our country it had no negative effect on the creation of new works. The resale rights legislation did not affect the german market as our society came to a general agreement with the art dealers associations in 1980, which allowed them to pay an average amount of their gross income in order to cover all the resale royalty payments. By this agreement they have to pay an annual contribution of 1.3 % out of their gross income. The money collected on this basis by our society is then distributed to the single artist according to the german legislation which entitles the copyright owner to collect a fee of 5 % of the resale price in any resale case.

You will note that the basis of collecting the money is different from the way of distribution; anyway this method turned out to be a very harmonic way of collecting and distributing droit de suite without creating any conflicts between art dealers and artists.

The amount of money collected by our society in the year 1990 was about 7,5 million Deutsche Mark. There are continuous contacts with the art dealers association in order to take care that the system keeps working.

Besides the collecting through the above mentioned percentage out of the gross income there is a separate collection of the legal fee in those cases where galleries do not want to join the general agreement. Out of this individual collection we got 0,5 million Deutsche Mark in the past year.

2. All the experience in Europe showed that a resale royalty is only working if its attributed to the resale price. It's practically impossible

to attribute any royalties to any increase in value. The amount of the resale royalty in Europe varies between 2 % (Spain) and 6 % (Portugal). In France the fee is 3 %, in Germany and Denmark 5 %. In Denmark the copyright fee covers any resale, not only sales attributed to artists or estates of artists who are represented by collecting societies.

3. The european collecting societies handling the resale royalties are exchanging money among those countries who have a similar legislation. The german copyright law has a special provision which attributes the right to claim resale royalties only to artists of those countries who have a similar legislation. We are of the opinion that the entitlement to claim resale royalties must take into consideration the international relations of the art market and should not be attributed to native artists only. For this reason and following the principles of the Bern Convention we think the droit de suite should be extended to all the Bern states and consequently members of the Bern states should be entitled to claim their royalties.

As you know the Federal Republic accepts the participation of Bern authors in any other royalty like in the blank tape royalty even for american authors where similar legislation does not exist.

From our understanding of the mechanism of copyright law within the European states and within Bern convention states there would be no problem for american artists to claim resale royalties in Europe retroactively as soon as a respective legislation would have been taken by the United States.

4. In the german law only a collecting society has the right to ask for resales and only for those resales which took place in the past year. The claim of the resale royalty - in case the resale is known - can be asserted within ten years after the resale date.

The resale legislation in the whole and the right to ask for resale royalties is in line with the protection term of the authors rights, i.e. in Germany 70 years after the death of the author.

5. The technical requirements to execute a resale royalty collection from our experience are the right to ask for information about resale cases, which might be handled by a collecting society and should not be handled by the individual author.

We are sure that a resale royalty cannot be executed without the help of a collecting society as an individual claim brought up by an individual author against a gallery will immediately have the worst consequences for this artist like boycotts etc. Only a strong collecting society can organize a working system.

The example of the Federal Republic of Germany, where all organizations of the art market and the collecting societies established the collecting through our society, shows that it is quite easy to establish working conditions. The administrative fees for handling the resale royalty in our country are not higher than 10 %.

We are ready to give you any further information.

Yours sincerely,

- dictated by

Mr. Pfennig and signed

in his absence :

  
(Groening)

enclosure:

- statement of CISAC concerning resale royalties (droit de suite)

International Confederation of Societies of Authors and Composers  
(CISAC)

European Copyright Days

Rome, 1. - 3. October 1990

Droit de suite

by Mr. G. Pfennig (Bild-Kunst - FRG)

#### 1. Legal foundations

Article 14 ter of the revised Bern Convention grants the author an inalienable right to participate in the proceeds from sales of a visual arts work subsequent to the first transfer by the author. This protection can only be claimed in each country of the union in so far as the authors national legislation affords such protection and to the extent permitted by the legislative provisions of the country where this protection is claimed.

#### 2. The idea of droit de suite

The idea of the droit de suite is based on the fact that - different from any other creators - the visual artists can sell originals of their work, including small editions of graphic works, only once; they are then excluded from the profit this work might gain when it is circulating in the art market.

Other authors like composers and writers have the possibility to permit the reproduction, public representation, television and radio broadcasting and other uses of their work and get their income on that basis. For the visual artist there exists just the possibility to grant reproduction rights but the economical proceeds from these rights cannot be compared to the income of the other authors.

In this situation the *droit de suite* allows the visual artist - and should allow the creator of photographic works - to benefit from the profits gained by sellers of art works circulating in the art market.

Practice shows that the cases are numerous where artists due to their very often weak economical situation sell works at a very low price which are later resold at incredible high prices in the art market. It is not necessary to cite Van Gogh; the most recent example is the german artist Joseph Beuys, whose works were sold during the lifetime of the artist at reasonable low prices and now reach the highest rates in the international auctions.

There is no doubt that the *droit de suite* remunerations contribute to a large extent to the living conditions of visual artists whose works are sold in the art market; as far as estates are concerned there is evidence that the income of this remuneration is used for the maintenance of foundations, archives and documentaries kept by the estates of wellknown artists and museums.

Following the fundamental idea of any copyright legislation to make the creator participate in the advantages others take from the use of his work *droit de suite* legislation has been enacted in many member-states of the Bern Convention.



### 3. Droit de suite in the European Community

As far as member-states of the European Community are concerned, the droit de suite has been introduced in Belgium, Denmark, Federal Republic of Germany, France, Italy, Portugal and Spain.

Opponents to the droit de suite have used the argument that a droit de suite legislation would complicate the relations between art dealers and artists themselves and there would be no way to execute practical administration.

The existing examples of different european countries prove that droit de suite can be handled sufficiently through copyright collecting societies.

Especially in France, where for the time being droit de suite is only administered in public auctions on an administrative basis which creates no problem at all, and in the Federal Republic of Germany, where the collecting society handles the perception on the basis of the general agreement on the basis of a contract with the National Board of Art Dealers Association is giving evidence that this right can be administered without technical problems.

The fact that the droit de suite legislation has not been introduced to all member-states of the European Community might lead to a distortion of the art market as vendors of works of art could try to escape this remuneration by selling their works in countries of the community where a droit de suite legislation does not exists.

There is doubt whether nationals of a droit de suite country are exempt of the payment if they sell in a non - droit de suite country; the collecting society Bild-Kunst of the Federal Republic of Germany has just enacted a model law suit against an german seller who sold

through the intermediary of an auction house based in London to claim droit de suite for this sale. Should the German court decide this sale is due to the German droit de suite legislation and should this jurisdiction be extended for example to France, this could be an extension of droit de suite to other countries without introducing a legislation there. But for the benefit of the art market all over Europe the artists in the European countries and the collecting societies are of the opinion that an extension of the droit de suite legislation to all member-states of the Community would be the most preferable solution.

#### 4. CISACs droit de suite recommendation

On the occasion of its meeting from 17th and 18th September 1990 in Gstaad the EEC-committee of CISAC formulated a proposal of a model droit de suite directive of the European Community on the basis of a proposal of the working group "droit de suite" of the International Council of Authors of the Graphic and Plastic Arts and of Photographers.

These principles are the following:

1. Beneficiaries:  
Artist, their heirs and holders of legacies should benefit from droit de suite legislation.
2. Exclusion of assignment  
It should be excluded by law that the artist can waive his droit de suite during his lifetime.

*Experience in droit de suite-countries shows that the art market would try to make the artist sign droit de suite*

*when selling the work of art if this would not be prevented by law.*

3. Protection term

Like any other author's right droit de suite should be protected 70 years post mortem auctoris.

4. Protected works

All works of plastic and graphic art - drawings, paintings, prints, sculptures and tapestries - should be protected by droit de suite; multiplied works should also be included as far as the art market considers them as original works of art.

As far as photography is concerned, CISAC recommends to include works of photographic art in the droit de suite legislation if they are object of the art market.

*An evidence is that during the last 10 years works of famous photographers such as Brassai, August Sander, Man Ray and Mapplethorpe raised high prices in special auctions and in specialized art galleries. Photography has been developed as an object of the art market as far as original prints are concerned. Due to this development there is no reason to exclude photographers from the benefits of droit de suite especially for the reason that many famous artists - like Man Ray and Andy Warhol - worked as well as sculptors, painters and photographers.*

5. Sales subject to droit de suite

In all cases where the original of an artistic work is resold the vendor shall pay the droit de suite participation to the author if such a resale involves an art dealer or auctionaire as purchaser, vendor or agent.

6. Minimum price

Only resales above a minimum resale price of 150 ECU should entitle the author to claim droit de suite.

The definition of a minimum is necessary to avoid unprofitable administration of low price sales.

7. Definition of resale price

The basis for the droit de suite payment should be the resale price; a legislation connected to the surplus value does not seem practical.

Currently there are different droit de suite percentages in the european states; they thrive from 6 % (Portugal) to 2 % (Spain).

*In the discussion about the introduction of droit de suite there is often heard the argument that the droit de suite remuneration cannot be connected to the resale price as not every resale leads to the augmentation of the value of the work of art. This idea might be right in single cases; on the other hand there cannot be any doubt that the majority of sales through the art market leads to higher rates than the first sales price. It is not only the result of simple economic logic but takes into consideration the continuous growing of prices for art works in the international art market.*

8. Handling of droit de suite

The collective administration of the droit de suite can only be guaranteed if a collecting body is involved.

The collecting society should have the right to ask for information in any case of resale, to collect the money and to distribute the money to artists and estates.

*The experience in France and the Federal Republic of Germany shows that without introduction of the right to ask for information for the collecting societies into the droit de suite legislation an effective realisation of this right is not possible especially towards the private art dealers. The position of the single artist against the art market is normally too weak to realize his droit de suite individually. Because of this reason the droit de suite can only be handled through the intermediary of a collective society. This has also the effect that the art market has just one partner who collects every information and the payments instead of dealing with a large number of single artists or estates.*

**EVA: Answers to the Questionnaire  
on Droit de Suite in the European Community**

- 1. Does it seem to you necessary that the Member States' provisions on droit de suite be harmonized at the Community level?**

**Answer:**

For artists engaged in the fine arts droit de suite is one of the most important authors rights.

Unlike authors of other kinds of work who draw in many ways economic benefit from public performance and mechanical or other reproduction of their works, these artists can sell their original works only once. Droit de suite considers the special value the original work has on the art market and thus enables artists, too, to benefit from the increase in the value of their works.

The fact that droit de suite has not yet been introduced in all Member States of the Community affects the living conditions of artists living in those countries that do not recognize this right.

Artists engaged in fine arts are underprivileged compared to authors of literature and music, for example, because the authors rights of the latter exist in all Member States of the Community or because important exploitation rights benefitting those authors in particular are just being harmonized at Community level (c. private reproduction, cable and satellite networks).

The present situation also affects art dealers. It is true that droit de suite is only one factor that goes into the market price of a piece of art. Nevertheless, the fact that droit de suite does not exist in all Member States brings about distortions of markets and competition.



2. Please indicate, in respect of the last ten years, the amounts collected annually under droit de suite, broken down if possible according to the nature of the work and by beneficiary.

Answer:

The following table shows the 1981 - 1990 revenues from those countries of the Community that do recognize droit de suite.

- In 1.000 ECU\* -

Year	F	D	B1)	DK2)	E3)
1981	338	182			
1982	347	404			
1983	674	427			
1984	657	365			
1985	711	553			
1986	1.110	582			
1987	1.571	885			
1988	3.105	895			
1989	6.727	1.403			
1990	11.871	2.155	189	223	
1991					31

\* 1 ECU = FF 7,0; FB 42,3; DK 7,9; Pts 129; DM 2,05

- 1) It is impossible to obtain any information on collection by the state. The only information available is on the copyright collecting society SABAM. The indications are therefore estimates.
- 2) Revenues from the second half of 1990, the first collection period after the introduction of the law.
- 3) For comparison: Revenues from the first half of 1991, the first collection period after the introduction of the law.

For technical reasons it is not possible to give details on the distribution of revenues by copyright collecting societies.

Beneficiaries of revenues, however, are not only living artists and their heirs. Certain percentages of the revenues are also used - in accordance with distribution plans of the copyright collecting societies - in many ways in the social field and to support young artists.

Any future EC directive should recommend such use of a part of the revenue to benefit the community of artists.

3. Which types of article are covered by droit de suite (fine arts of all descriptions, photographic works ...)? How should the term "original work" be defined in this context?

Answer:

Droit de suite should be applicable to all works of fine art - paintings, drawings, original prints, lithographs, sculptures and tapestries.

Photographs, if they are of relevance to the art market, should also be covered by droit de suite.

Works of applied art should be covered by droit de suite as far as they enjoy the protection of copyright legislation. The definition of the term original work should be left to national legislation and jurisdiction or to art dealers and copyright collecting societies to find an agreement as far as the art market is concerned. It will not be necessary to include any definition into the process of harmonization.

4. To which types of sale should the droit de suite apply?

Answer:

Droit de suite should apply to all cases where pieces of art are resold or bartered through art dealers or auctioneers acting as buyers, sellers or agents.

5. Please indicate what, in your opinion, should be the basis, the rate(s) and the minimum threshold of applicability of droit de suite.

Answer:

Droit de suite should be part of national copyright legislation.

Rates should be calculated on the resale price regardless of profit margins.

Rates should be paid by the seller.

The minimum threshold of applicability should be 150 ECU.

**6. Should droit de suite be the subject of collective management?**

**Answer:**

We join the WIPO in their recommendation. Only collective management through a copyright collecting society guarantees satisfactory management of droit de suite.

Experience shows that individual management is difficult just because it is difficult to obtain the necessary information and assert claims against parties unwilling to perform.

**7. In your experience what are the aspects of droit de suite which present particular difficulties in respect of implementation? Please give reasons.**

**Answer:**

Problems in implementing droit de suite arise especially when copyright collecting societies and holders of interests are refused the information they need to assert their claims.

Therefore, a directive should follow examples in various Member States and include the seller's obligation to transfer all necessary information on works of art he sells as well as selling prices to a copyright collecting society. Such a directive should also prescribe sanctions to help assert claims.

**8. If droit de suite were to be introduced in the Community, would it be necessary for there to be measures aimed at preventing sales from being displaced to other countries which do not recognize such a right? At what rate of levy of the droit de suite do you think the risk of evasion will become significant?**

**Answer:**

We do not think that any important changes will occur on the art market when droit de suite is introduced in all Member States.

The European economic space of art trade will be strong and attractive enough to support droit de suite. What is more, any displacement of markets would entail great expense.

In addition, as is well known, a couple of countries that are not members of the EC have plans to introduce droit de suite as well. Even the United States are considering this step. Under such conditions a displacement of markets would be useless.

Experience with the introduction of droit de suite in individual Member States confirms that art trade stays in its traditional locations and environments. As far as we know, neither Germany nor Denmark or Spain have seen displacements of any importance.

We therefore think that there will be no need for particular measures against displacement.

9. Which artists should benefit from the droit de suite (EC nationals, third country nationals living in the Community, others)? More generally, how should the reciprocity provision in Article 14ter of the Berne Convention be applied?

Answer:

All artists who are citizens or inhabitants of a Member State should most certainly benefit from droit de suite. Third country nations should benefit only on the basis of reciprocity in accordance with Article 14ter of the Berne Convention.

States should participate only under the condition of reciprocity in accordance with Article 14ter of the Berne Convention.

We are convinced that such regulations would encourage third countries to make droit de suite available to their artists as well.

143 Cross Street.  
Norwell, MA 02061  
April 23, 1991

Office of the Registrar of Copyrights  
Copyright Office  
James Madison Bldg., Room 403  
First and Independence Avenue, S.E.  
Washington, DC 20559

Comment Letter	
RM	91-1'
No.	<u>13</u>

Re: Comments on Resale Royalties for Works of Art

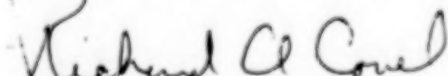
Gentlemen,

I offer the following limited comments on the concept of resale of art from the perspective of both the artists and the purchaser or repurchaser of art.

1. Resale Royalties regulations should only be applicable to sales or resales of art exceeding a certain value, i.e. \$5,000.00 U.S. or in kind value. Such a regulation would provide standing notice to purchasers of a level of value of art that a commission is due the artist.
2. The regulations should require that sellers of art notify and pay the artist for resales. The regulations should provide an alternate notification to the Copyright Office in cases where the artist cannot be located. Failure of an artist to claim a royalty within 5 years of a notice of resale in the Copyright Office should provide a defense for the seller to make such payment.
3. Failure of a Seller to comply with resale royalties notifications and payments should carry civil fines and double royalty payments. Purchasers of art may require an artist's acknowledgement of receipt of royalties from the Seller prior to the consumation of the resale.
4. Resale Royalties should be deductible from any capital losses or gains of the resale of art by the seller and should be considered ordinary income to the artist.
5. Enforcement of the resale regulations should be accomplished by a citizen suit in the Federal Courts.

Thank you for the opportunity to comment.

Very truly yours,



Richard A. Covell, Esq.  
Intellectual Property Attorney





# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

## NOTICE OF PUBLIC HEARINGS

### PUBLIC HEARINGS: ARTISTS' RESALE ROYALTIES

The following excerpt is taken from Volume 57, Number 8 of the Federal Register for Monday, January 13, 1992 (p. 1281)

#### LIBRARY OF CONGRESS

##### Copyright Office

(Docket No. 91-1)

##### Public Hearings: Artists' Resale Royalties

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public hearings.

**SUMMARY:** The Copyright Office issues this notice to inform the public that it will hold hearings in connection with a report to Congress on artists' resale royalties. The Office invites comment or participation in the public hearings from individuals or groups involved in the creation, exhibition, dissemination, and preservation of works of arts, including artists, artists' organizations, art dealers, auction houses, art galleries, art museums, collectors of fine art, and investment advisors.

**DATES AND ADDRESSES:** The public hearings will be held on January 23, 1992 in San Francisco, California at the Fort

Mason Center, Building F ("The Firehouse"), and on March 6, 1992 in New York City, New York at the United States Courthouse, Foley Square, on both dates from 9:30 a.m. to 6 p.m., depending on requests for participation. Anyone desiring to testify should contact William Patry, Policy Planning Advisor to the Register of Copyrights, Copyright Office, by telephone (202) 707-8350 or fax transmission (202) 707-8366. For the January 23, 1992 San Francisco hearing, such requests should be received no later than January 16, 1992. For the March 6, 1992 New York City hearing, such requests should be received no later than February 21, 1992. All requests to testify should clearly identify the individual or group desiring to testify.

**FOR FURTHER INFORMATION CONTACT:** William Patry, Policy Planning Advisor to the Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Telephone (202) 707-8350.

**SUPPLEMENTARY INFORMATION:** On February 1, 1991 (56 FR 4110), the Copyright Office published in the Federal Register a Notice of Inquiry and

Request for Information, seeking information in connection with a report to Congress on the question of artists' resale royalties that the Copyright Office is statutorily required to submit on June 1, 1992. The Copyright Office received a number of responses to this Request for Information. However, in order to afford artists, galleries, art dealers, museums, and others involved in the art market who might not otherwise have an opportunity to present their views, the Copyright Office has scheduled the above-referenced hearings. Those testifying should respond, as relevant to their particular situation, to the questions posed in the February 1, 1991 Request for Information.

Dated: January 3, 1992.

Ralph Oman,  
Register of Copyrights.

Approved by:  
James H. Billington,  
The Librarian of Congress.

[FR Doc. 92-774 Filed 1-10-92; 8:45 am]

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**PART II - Transcript of San Francisco Hearing**

THE LIBRARY OF CONGRESS  
COPYRIGHT OFFICE

PUBLIC HEARING  
ON THE FEDERAL VISUAL ARTISTS  
RESALE ROYALTIES ACT

BEFORE:

WILLIAM F. PATRY  
POLICY PLANNING ADVISOR  
CHAIRMAN

THURSDAY, JANUARY 23, 1992  
SAN FRANCISCO, CA

# WITNESSES

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---o0o---

MR. PATRY: Good morning. My name is William Patry. I'm a policy planning advisor to the Register of Copyrights in the Library of Congress. As our location implies, we are a legislative branch agency. We advise Congress on legislation. We assist them in drafting it. We testify before them on issues. When requested, we prepare reports for Congress on issues that are of concern to them.

The hearing today and its companion on March 6 in New York City is the result of legislation that was signed by the President on December 1, 1990. This was the Visual Artists' Rights Act of 1990. For the first time, this act gave to visual artists certain moral rights -- rights with respect to attribution and to prevent the mutilation or destruction or distortion of their works.

Earlier versions of that legislation contain provisions on resale royalty rights or droit de suite, as it has been known since its introduction in France in 1920. Resale royalties have been a part of California law since January 1, 1977.

During the hearings on the Visual Artists Rights' Act, there was discussion of having an artist's resale royalty rights law federally. Earlier bills were introduced by Representative Waxman by Representative Downey. Not surprisingly, there was testimony in opposition to the artist resale royalty provision by galleries, art dealers, and others.

As a result of this opposition and the fact that there was no opposition to the other visual artists' rights provisions, Congress decided to move ahead on the moral rights part of the bill, but requested the Copyright Office to do a study on the feasibility of a federal resale royalty provision.

The hearing today is a part of that study. The study is to be presented to Congress on June 1, 1992.

Since California is the only state that has an artist resale royalty provision, we will be able to gain information today about your experiences -- how it works; whether the California law should be a model for any federal legislation; whether the California law could be improved if we do have a federal law; how the California law has benefited artists and which artists; whether the California law has had a negative impact, if at all, on the art market in California. Finally, we are interested in finding out whether you think there should be a federal droit de suite provision.

We will have witnesses on both sides of the issue. Anyone is free to submit written comments to me at any time up to June 1. Of course, the earlier the better, because I'll have more of a chance to consider them.

The schedule will be as follows: We'll begin with Professor Goetzl, followed by a panel consisting of Mr. Davis and a number of artists. Then we will have testimony from Professor John Henry Merryman of Stanford University who, I think, takes a different view from the other witnesses. We will conclude with a panel of witnesses representing the artists' viewpoint.

I expect we'll probably conclude by lunchtime. If we go over, however long it takes, that's fine.

Professor Goetzl is a professor of law at Golden Gate University. He has worked on arts legislation for seventeen years, including works on the original drafts of the bill that became the California Art Preservation Act found in the California Civil Code, I believe, Section 987.

He is a member of the board of directors of California Lawyers for the Arts. On their behalf, he submitted comments to the Copyright Office in this

inquiry. He's the author or co-author of a number of articles in the field, including "Artists' Rights: The Kennedy Proposal to Amend the Copyright Law" and "Copyright and the Visual Artists' Display Right: A New Doctrinal Analysis."

Welcome, Professor Goetzl, and you may begin.

PROFESSOR GOETZL: Thank you, Mr. Patry. It's a pleasure to be here. I have a number of things that I want to say about this legislation. I am generally very much a supporter of resale rights for artists. Indeed, I view resale rights as part of a larger picture.

I think one of the deficiencies of the copyright law is that artists have not been treated on the same basis as have other authors, in particular, with respect to the right to display. As set forth in my article, "Copyright and the Visual Artists' Display Right: A New Doctrinal Analysis," it is my conviction that artists should be granted some compensation when their works are displayed. Within that framework, the resale royalty then becomes an opportunity to assess that display right when the art is in a private context rather than in a public context.

In attempting to think about and address the needs of this study that you're conducting, I gave some thought to what is meant by "feasibility," because it's a rather vague and general term. It seems to me that it has two components.

One component is the desirability of the legislation in the first instance. The second component, assuming such legislation were enacted, is what form would it take, in particular, how would this right be implemented and enforced.

I think it is clearly the case that if you are to recommend its enactment and if Congress is to enact some kind of royalty legislation, then Congress can surely come up with a method which will make it enforceable.



At this point, I find it very useful to recall the experience under the 1897 amendments to the copyright law and under the 1909 Copyright Act granting a right to a royalty for the public performance for profit of music. The right lay largely dormant for a number of years.

It was finally in 1917, that the U.S. Supreme Court in Herbert v. Shanley Hotel, upheld the right of Victor Herbert, the composer, to collect a royalty when his music was played in a hotel dining room. That gave impetus to the formation of ASCAP and later on to BMI. It was through those private agencies that meat was put on the bones of this right which otherwise was difficult to enforce.

Our experience in California for the fifteen years that we've had resale royalty legislation is there is considerable debate about how effective this legislation has been in its present form. You're going to hear a good deal of testimony about this from the panel.

I can suggest an overview; there is little hard statistical data on the effectiveness of this legislative. Most of our information is anecdotal. What has not yet happened, however, because the application of the law is still limited only to California, is the creation of an A.S.C.A.P.-like enforcement organization.

The other part of this question that has to be considered, is whether or not droit de suite is something that Congress will choose to enact, or something you are going to recommend. Obviously, if it's not recommended, if it's not enacted, then it doesn't matter how enforceable a scheme would be. Nothing will come of it.

I don't know how much it is necessary to say about desirability. I'm pleased to know that you are familiar -- and apparently very familiar -- with all

of the pertinent literature. So, you're aware of the philosophy offered for the resale royalty by, for example, the French law and the contrasting philosophy of the German law. You are also familiar with the justification I've offered up in my article, which boils down to, really, a matter of fundamental fairness.

Even as the exploitation of intellectual property, of products of the mind, has been expanded over the years, so too, Congress has in a very irregular and inconsistent way perhaps, but nevertheless persistently, enlarged the exclusive rights available to authors.

Those who have lagged behind, however, are visual artists. Artists, at present, derive protection under the copyright law in terms of gaining remuneration only when their works are reproduced. The occasions where artwork is reproduced -- is rendered in copies -- are few. That is not where the primary market for visual art lies. The primary use of visual art, of course, lies in its viewing, in its display.

It is interesting in that connection to observe that there have been tentative steps taken in other countries to begin to compensate artists for this display. Most notably, Canada now awards exhibition fees on a regular basis to artists whose works travel. It is limited to those works that the Canadian government owns in its art bank. When these works are exhibited, artists are compensated.

A parallel to that, and also interesting to note in this regard, is the recent enactment of lending royalties in Western Europe, primarily in Great Britain and the Scandinavian countries. While many books find their primary use through the sale of copies, generating royalties for their authors, other books do not sell in large numbers, although they still enjoy wide readership. That's

because those books find their primary audience in libraries where they are just loaned.

The countries of Western Europe have begun to recognize this and have determined since it is not the paper and ink that are the subject of copyright, but rather the intellectual content of the books, in fairness, these authors should be awarded a royalty when their books are checked out of the library. The question which is clearly left unanswered at this point is where would the revenues come from to pay for this. It's a fair question. But I think answers can be found at an appropriate time.

Suffice it to say, a parallel exists when we have works of art on display in museums, in corporate offices, or even in private homes. In all these cases, the work is being enjoyed by a significant audience. Yet, no ongoing compensation is being shared with the artist.

Note, that if we look at sports and entertainment in this country, we will observe that athletes and entertainers -- and I'm using that in a very broad sense -- tend to be very, very well compensated. Fans think nothing of paying \$25 or \$30 for a ticket to go to the ball game. Others do not hesitate to pay \$50 to \$100 for a seat at the opera or the theatre. Indeed, even movies today charge seven or eight dollars for admission.

In stark contrast, our museums, which hold enormous valuable collections of wonderful art, remain the "last cheap date." In most parts of the country, museums are still free. Those which have begun charging admission charge very reasonable admissions -- three, four, or perhaps five dollars. Indeed, many are even less expensive than that.

It seems to me that if you take the long view of this, what has happened is that visual artists who are not compensated when their works are

displayed, have been subsidizing the public's enjoyment of art. I'm pleased to read that attendance at museums remains very, very high, even after the modest admission charges were imposed. It still is higher than all professional sports put together.

So, there are parallels here which suggest that artists have been shortchanged by the copyright law throughout U.S. history. The resale royalty, as it was enacted in California, represents a small step toward bridging that gap.

I came on the scene after this statute, California Civil Code Section 986, had first been enacted. So, I can't really, from my own experience, tell you what its genesis was. I did work a great deal with Senator Sieroty, its author, shortly after its enactment, in reviewing how it was working, and drafting the bill which embodied the amendments which took effect in 1982 and strengthened the law.

There are two main approaches to the enforcement of the resale royalty that can be taken: the first is what I would for convenience, refer to as a private enforcement mechanism. This is essentially what we have in California. The law provides that under certain circumstances, a royalty is due and payable. It is incumbent upon the artist to discover it is due, by whatever means, and then to make a demand for it and, if that fails, to bring suit against the seller or the seller's agent who has failed to pay it.

This presents challenges: artists don't always know when a sale has occurred. There isn't any public repository of that kind of information. In addition, many artists have reported anecdotally to me, to us at California Lawyers for the Arts, that they feel considerable inhibition in making demand upon sellers for this royalty. They fear that their galleries may decline to represent them in the future or that sellers will harbor bad feelings.



Realistically, precisely those artists whose works enjoy resales are the least likely to be dropped by galleries. Neither are collectors likely to harbor bad feelings for long. On the contrary, most collectors are eager to maintain good relations with the artist. Part of the caché of collecting art is the familiarity and friendship with the artists that one can then enjoy.

The second approach to the enforcement of the resale royalty involves a more public kind of mechanism. This is what was initially contemplated in HR 11403, Henry Waxman's seminal resale royalty bill, introduced in 1978. It provided for a federal registry where all sales would be registered, and where artists would have to register. It apparently was that model which was then incorporated into the initial proposal introduced by Senator Kennedy as S. 2796. This is a very different way to go about it.

As that bill was first introduced, it would have required artists who sought to collect a resale royalty to register their name and address with the Copyright Office. It would also have required that sellers register the occasion of the sale with the Copyright Office.

Given a choice between these two mechanisms, my personal recommendation would be to refrain from creating more government bureaucracies, with whatever expense they might entail. These above requirements would also impair the confidentiality of the transactions, the identity of the parties, and the sums involved.

I would prefer a private system very much following the example of what has been done in collecting the royalties occasioned by the public performance for profit of copyrighted music. Leave it to the formation of an "A.S.C.A.P." or "Broadcast Music, Inc." to take a transfer of the rights from the artist for the purpose of collecting royalties.

It was in specific anticipation of such collecting societies that the 1982 amendments to the California Resale Royalty Act modified the prohibition of a waiver of the right. The resale royalty right is non-waivable, both in California and as proposed in Senator Kennedy's original bill, with the exception that a transfer for the purpose of facilitating its collection, could be lawfully done.

It is going to take some time for such an organization to be formed. But such an organization would probably prove to be a more efficient and satisfactory way to bring about the enforcement of such a resale royalty.

MR. PATRY: Thank you very much. I have a few questions.

PROFESSOR GOETZL: Okay. Thank you.

MR. PATRY: There are a number of different justifications that one hears for droit de suite, one of which is that artists should benefit from the subsequent increase in the value of the work. The theory is that most of the increase is the result of the artist's original work and not particularly the work of gallery owners or dealers or auction houses, although they probably have a different viewpoint on that.

But theoretically, at least, that is one justification. But, in Europe, that's not the way, in fact, droit de suite is administered. As you know, it's done on any sale. So, there are at least a number of models that one could pick. California has picked one.

On the federal level, you could pick a model that, in fact, only kicks in droit de suite once there has been an increase in the sale amount. Another way would be to follow the European approach, which is to have it for any sale, even if that sale results in a loss.



In my reading on this, I came across a statement by you. The quote was -- and you can tell me whether it's accurate or not -- "artists are the only socialists in a capitalist system."

PROFESSOR GOETZL: That is accurate.

MR. PATRY: My question is this: If we were to give artists full-fledged status as capitalists, would not a logical corollary to that be for them to share in any losses. In other words, if you're going to give them capitalist status and say that they should benefit, why shouldn't they also share in losses?

PROFESSOR GOETZL: No. That does not follow at all. The quoted statement was in response to so many people criticizing the resale royalty concept on the grounds that it would only benefit wealthy artists. These critics characterize the resale royalty as welfare-type legislation and then criticize it for not benefitting poor artists.

In response to that, I said artists ought not to be the only socialists in a capitalist society. To be consistent with the way in which other authors are treated under the copyright law, successful, wealthy artists should continue to become even wealthier if their works enjoy continued popularity. Just as is the case for those who own valuable patents or those who own copyrights on popular books, popular songs, or popular dramatic works, they should also be entitled to get richer and richer and richer.

Now, I don't think this is the occasion to re-examine capitalism in that sense. My point is simply that artists ought to be treated on the same basis as other authors.

With respect to how the royalty would work, I think you're quite right. There are a number of choices that could be followed. I think we can break it down neatly into three such options.

One, a sort of middle system, is what California does. That is, whenever there is a resale which has been for a profit -- i.e., at a higher price than what was originally paid for the work, a royalty is due on the entire resale price irrespective of the possibility that it may generate a net loss to the collector. I notice parenthetically that the gallery which resells the work will take a commission even though that commission results in a loss to the seller.

What was included in Senator Kennedy's bill initially was the concept that while the royalty might be a more generous percentage, it should be applied only against the appreciation. This would, at least insofar as the royalty is concerned, assure the collector that he or she would not suffer a loss due to the resale royalty. That's at one extreme.

At the other extreme is the view that a royalty should be paid even if the work is sold at a loss. I speak only for myself at this point with respect to that. I would support that. My writings endorse that. I believe that the justification for a resale royalty lies not in the appreciation in value of the work as much as in the very existence of another audience for the work.

I note in that connection that if I'm a playwright and a theater company desires to present my copyrighted work, we will negotiate a royalty to be paid to me. Even if the presentation of that play proves a flop. That simply is a cost of doing business.

So too, if a movie producer wishes to buy the rights to make a film from my book, they pay me whether the film makes money or loses money. I think

it is appropriate to envision that kind of a parallel where a work of art is purchased and where it then is going to move on to another audience, as it were.

MR. PATRY: To use your analogy for literary works, if you're an author and you enter into a contract and you get an advance and you get a certain percent for the subsequent sales of your work and multiple copies, you don't have to give your advance back, usually, if your work turns out to be not successful.

The difference in the counter argument though -- and my question is this -- is that if you have a droit de suite where it's not triggered perhaps by an increase, to some extent it could be argued that it gives visual artists the best of both worlds. Why shouldn't they be treated just like authors? Shouldn't they negotiate just like authors do, and get whatever money they can?

Otherwise, they would have a situation then where they would benefit from the subsequent sales, take a cut in those sales, but not take any of the risk for any particular losses. So to that extent they would be treated a little bit better than literary artists. I'm well aware of the counter arguments -- and I'll ask Professor Merryman about his too -- that, of course, that's the way in which they're exploited, that it's rather different for visual artists, since their works are only exploited commercially, and they only make money from the sales of the originals.

Those are all the questions I have right now. As I mentioned earlier you are free to submit any written comments and perhaps we'll have other questions later. Thank you very much for your original submission as well, which was very helpful. All of it will go into the record.

PROFESSOR GOETZL: Good. Thank you very much.

MR. PATRY: Thank you very much.

Next up, we have Jack Davis, Alma Robinson, and Brenda Berlin.

You could join them as well. Do it together as a panel.

Alma, is Brenda going to join you as well?

MS. ROBINSON: She's here.

MS. BERLIN: Welcome to sunny California.

MR. PATRY: Yes. When I left Washington, there was a high of 28, and I was looking forward to this. We'll see.

On our next panel is Jack Davis, an attorney from San Francisco, a member of the board of California Lawyers for the Arts and one of the attorneys in the landmark Morseburg v. Balyon case testing the constitutionality of the California statute; Alma Robinson, executive director, California Lawyers for the Arts; and Brenda Berlin, chairperson of the San Francisco Arts Democratic Club. You can proceed any way you want.

MR. DAVIS: Good morning, sir, and welcome to warm, sunny California.

MR. PATRY: Having grown up here, I know Mark Twain has been quoted as saying the coldest winter he ever spent was one summer in San Francisco.

MR. DAVIS: It does get colder than this.

I was privileged, as you know, to represent Richard Mayer and another artist, Peter Alexander, as intervenors in the case of Morseburg versus Balyon which was then renamed Morseburg v. Balyon v. Mayer, the lawsuit in which the constitutionality of the California Artist Resale Royalties Act was challenged.

During the course of working on that case, I had occasion to talk at length with Dick and with other people working on the case about the nature of the resale royalty and some of the reasons for it. It finally occurred to me that the best way to explain the justification for a resale royalty act is to provide a reward to an artist, not just for each work he creates, but for the dedication of the artist to a life of work on his or her artwork.



The most ready example to consider is the work that Pablo Picasso did at the turn of the century. If he had made some of those wonderful drawings in 1905 and 1906 and then never made another work of art in his life, I think most of us would agree that that artwork would not have increased in value over the succeeding years. He would have been another artist who left the field and left some nice artwork, but perhaps not remarkable artwork and certainly not remarkably valuable artwork behind him.

What he did instead was continue to work, developing not only himself as a person, but as an artist. He also created a name for himself. In my representation of artists, I have found that another almost discrete area of the endeavor of being an artist is the creation of a name for oneself and that very difficult process of marketing oneself and making oneself and one's work known.

Picasso kept doing that. He did that throughout his life, and he created a worldwide reputation for himself. It was that, as well as the original creation of the artwork itself, that increased the value of his artwork as time passed.

I think that what the California Resale Royalties Act does, and what any droit de suite does is to reward that continuing effort and to give an artist a share in what his or her later work contributes to the increased value of an earlier work. I think that this is fair and equitable, not only a very reasonable way of recognizing art work and the dedication that artists give to their profession, but also a valuable way of encouraging artists to continue their work and to make the sacrifices that all artists do.

The other thing that struck me was that having a resale royalty right is an important piece of recognition, in and of itself, for artists, that provides encouragement. If art is an important cultural asset to any country or

to the world at large, certainly encouragement of the development of that piece of our culture is an important thing as well.

Those reasons apply not only in the state context, but in the federal context, and should help provide part of the motivation for establishing a resale royalty act, which I support.

I'd like to direct my other comments to some of the enforcement problems, which are very serious here in California. Although the State of California is a residual beneficiary of the Resale Royalties Act, and it has an escheat interest in the resale royalties which it collects when can't find the artist for payment of it, the state really never put forth has and certainly in these economic times can't be expected to mount a substantial enforcement effort. They haven't elected to do that even though we've asked them to on a number of occasions.

There are great difficulties in private enforcement by individual artists. First is the difficulty of finding out about resales. Artists just don't have the sorts of informational resources that are needed to find out about private transactions for which there is no real reporting requirement and no affirmative obligation to notify.

There is an affirmative obligation under the California law to pay, and thus you can imply an obligation to notify the artist of the resale. But it's just not done. That's something that's honored far more often in the breach than in the observance. It's very, very difficult to know when one's artwork is being resold.

Second is the expense of pursuit. Even though there's a provision in the Resale Royalty Act for recovering attorney's fees, the cost of mounting



a lawsuit is substantial. To many artists, if not most, it's going to be an enormous deterrent.

But perhaps the most serious impediment to enforcement is the fear of being blackballed. On more than one occasion, I've encountered instances of gross, wholesale violation of the Resale Royalty Act on a repeated basis by very reputable large galleries and auction houses.

I have discussed with the artists entitled to the royalties their right to pursue the royalties. Even though the violations seem clear and the right to recover royalties seems clear and even though it's a very broad ranging violation, the artists back off.

One very well established San Francisco Bay Area artist, several of whose works had been resold within the recently amended Resale Royalties Act by a very well respected -- I was going to say reputable, but I personally don't see that auction house as reputable -- would not pursue it even under pressure from his friends and peers to do so. There is an enormous fear of being blackballed, which is an enormous disincentive to enforce the right.

I think that what's needed in terms of enforcement is something that's as pervasive and yet as ordinary as tax enforcement. Perhaps resale royalty compliance could be one which the IRS audits, when it audits books generally, or perhaps in the course of some other governmental enforcement auditing practice, resale royalties could be part of the audit process. Perhaps it could be enforced that way.

I'm not sure that I know the right, specific mechanism, but it should be something that makes the payment of resale royalties something as mundane and regular as the payment of taxes, whether they be income tax or withholding taxes

or sales taxes, is really needed to make this a genuine right and one that's honored.

I would encourage you to encourage the Copyright Office to encourage Congress to find some mechanism of that sort. Thank you.

MR. PATRY: Thank you.

MS. ROBINSON: Shall I work on the heat for you?

MR. PATRY: That would be nice.

MS. ROBINSON: Excuse me one minute.

MR. PATRY: We had, I thought, turned it on when we first came in, but obviously not very efficiently.

While you're doing that, let me ask you a question. You said that one justification for droit de suite is encouraging the creation of art and culture. One of the arguments I've heard on the other side is that the real need is not necessarily for a secondary market, but that the real problem many artists face is the primary market, i.e., that the real need is for funding of money to encourage the initial sales.

One of the things I'd like to find out, is what is the difference between the primary market for the initial sale and the resale market? How large is the resale market? What does it consist of? Who gets their works resold more often than others? Whether, if one is going to have some sort of funds that are available to the artist, wherever they come from, whatever label you give them, however they're administered -- is the larger problem, the more immediate problem, helping artists get more initial sales. Is that a way to go rather than to set up a mechanism for resale?

Maybe they're not mutually exclusive. But I think it's a piece, at least, of empirical data that Congress should know. They should know how best to benefit artists. I'd be interested in what you think about that.

MR. DAVIS: I may not be the most qualified person to answer that because I'm not an expert in the art market. I don't know a great deal about it as a general matter, but my initial reaction is that artists need all the help they can get. They make a great many sacrifices to pursue their calling -- enormous sacrifices, which should be rewarded in any way we can find to reward them.

I would agree with what you said about the two not being mutually exclusive. I don't think they are mutually exclusive. I think we need to encourage and foster the initial creation of artwork. If that's what you mean by funding initial markets --

MR. PATRY: Yes.

MR. DAVIS: -- I think that supporting and perhaps even subsidizing artists is a very, very important cultural priority. I don't see any contradiction between helping artists with the initial creation of work and rewarding them for resales of their work, except in the sense that perhaps if you view the pot of money that there is as very finite, and necessitating making a choice between one and the other.

But I would note that what we're talking about in terms of establishing a resale royalty is not something that's going to be a great expense to taxpayers. The cost of moving a bill through Congress is something that I don't know about, but I don't think it is a material factor here. After that, I don't see the cost as being something substantial.

Certainly, Congress is not talking about paying the royalty out of public funds.

MR. PATRY: Right.

MR. DAVIS: It requires a private transaction. Really the only expense that I would see would be the enforcement expense which I think would be minimal if it were piggy-backed onto some other form of enforcement in the context of reviewing transactions like taxable events, like sales.

MR. PATRY: Yes. You could have a statute that had a mandatory disclosure requirement.

MR. DAVIS: I think there should be a mandatory disclosure requirement. I think it should have very, very severe sanctions for those who violate it. Because I think that in California, the problem has been that resellers feel no obligation to comply.

MR. PATRY: Would you agree with Professor Goetzl that there needs to be some sort of collecting society, which would take care of some of the problems of enforcement and remove an artist's fear of being blackballed, because the collecting society would enforce the right. Or maybe it wouldn't, because the society would still be collecting on behalf of the particular individual.

Collecting societies in France and Germany, thought this was essential to their system.

MR. DAVIS: Do you mean a monitoring society like ASCAP --

MR. PATRY: An ASCAP, BMI type of system, yes. These are organizations that do other things as well. ADAGP in Paris also licenses reproduction rights and does other things as well.

MR. DAVIS: I don't think that I know the mechanics of the market well enough to know whether a monitoring or collecting society would work. If



it's workable, certainly. Anything that they can do to help promote the effectuation of a federal Resale Royalty Act, so that it is not like the Resale Royalties Act has been in California.

MR. PATRY: How then would you get around the fear of being blackballed?

MR. DAVIS: By making the enforcement mechanism something extrinsic to the artist/reseller relationship. I mean that more in an artist/gallery situation than in the individual collectors situation.

But certainly, I think that some third party authority like the government should take responsibility for enforcement. It seems to me that there ought to be a way to figure that out without it's being terribly expensive.

MR. PATRY: Okay. Thank you.

MS. ROBINSON: Good morning. My name is Alma Robinson, and I'm the executive director of California Lawyers for the Arts. Thank you for the opportunity to testify on behalf of our 2,000 members who include artists and attorneys as well as arts administrators, teachers and other professionals throughout California.

Our organization, which was started as Bay Area Lawyers for the Arts in 1974, has now become statewide with offices in Los Angeles and Oakland, as well as San Francisco. California Lawyers for the Arts has historically supported resale royalties for visual artists because it makes economic and ethical sense to allow the creators of artwork to share in the benefits of their labor when the value of their work appreciates.

We are pleased to be a co-sponsor of the survey which the Artists Equity Association is now conducting to develop more information about the

effectiveness of the California Resale Royalty Law, Civil Code § 986. I have a copy of the survey for you, but you have obviously seen it.

MR. PATRY: Thank you.

MS. ROBINSON: The career of a visual artist requires long years of sacrifice in an often solitary endeavor, with minimal support. In order to spend years in research and development, many artists sacrifice the opportunity to live a normal professional life with steady incomes, health insurance, and retirement funds.

To award them a small share of the resale price is an acknowledgement of and reward for years of effort previously spent. This makes economic sense. For younger and beginning artists, the possibility of a resale royalty provides an important incentive to continue their work. If they do persevere in their careers, the likelihood that their work will enter the resale market is very slim.

It also makes moral sense. Surely collectors, dealers, museums, and auction houses should not be the only beneficiaries of an artist's continuing efforts. In California, the law provides royalties to the artist's estate for 20 years after the death of an artist. These royalties can provide an important source of support for surviving family members and heirs.

When the California act was passed in 1977, two concerns were expressed by some art dealers. One was that California would lose the art business to other states where buyers would go rather than pay a resale royalty. It appears that few art buyers are that shrewd. However, in our 1986 survey of art dealers and artists, some art dealers thought that a remedy for this would be a national law. I have previously submitted to you, a summary of the research that we compiled in 1986. (See attached).



MR. PATRY: Yes. Thank you.

MS. ROBINSON: In any case, there has been no evidence that the law has driven the art market out of the state. Rather, it appears that there are vibrant and healthy art markets in the Bay Area as well as Los Angeles, the effects of the last two years of recession notwithstanding.

Another concern often expressed was the fear that additional paperwork and research would be required. In fact, the resale royalty, according to dealers who have paid it in good faith, requires very little paperwork beyond computing the royalty and finding the artist.

One art dealer who is active in the resale market observed recently that the artists who were due royalties were generally well known and easy to locate. In her experience of the last two years, when she paid a total of 18 royalties, she had trouble tracking down only one artist, and he was eventually located through his gallery.

Furthermore, her enthusiasm about the letters of appreciation she received from artists, the referrals that were generated and the general good will she has experienced in the artists' community seemed to have more than compensated for any minor record-keeping she has had to undertake.

Three suggestions have emerged from our research and evaluation of this law. A lower threshold, such as a \$500 resale price rather than the \$1,000 minimum as required by the California statute would allow more artists to benefit from the royalty. We have conducted some analysis of the range of sales prices that artists generally experience, at least the ones who did respond to this survey. There was a modest range of sales prices. Probably the \$500 threshold would at least triple the amount of artists that were eligible.

Secondly, the requirement that the piece resell for more than the original sales price requires some research and record-keeping on the part of the seller and investigative research on the part of artists or their representatives, who are trying to collect outstanding royalties.

In France, the comparable droit de suite does not have this condition and seems much easier to enforce by the two principal agencies who are engaged in collecting the royalties. The French law applies to the resale of any original work of art resold for at least 100 francs.

Third, we hope that you will recommend an alternative dispute resolution mechanism such as mediation or arbitration in the event that mediation fails, which will require the parties to work out the dispute outside of court. We find that the litigation process is so expensive and clumsy that even the promise of recovering attorneys fees has not enabled artists to pursue their remedies in the state courts of California.

The right to sue in federal court, possibly on a copyright claim, would be even more burdensome. Because of the difficulty of prosecuting these claims in court and the possible harm to the plaintiff's reputation in a market as insular as the art world, many galleries and dealers know that artists are more likely to abandon their rights, therefore, they simply refuse to pay the royalties.

In conclusion, the countries entering the European economic community are now looking at the eight versions of the droit de suite enacted in various European countries, for possible ways to harmonize these statutes. At this time, the United States has an important opportunity to take an active leadership role in investigating all of the ways the royalty has been implemented and coming up with the best possible system.

We congratulate you for your efforts to date.

MR. PATRY: Thank you for coming, and I look forward to seeing the survey.

MS. BERLIN: Thank you. My name is Brenda Berlin, and I'm the president of San Francisco Arts Democratic Club which has a membership of over 300 democratic artists, administrators and individual art supporters. We're not a Republican club. It's a political club that we are. It's the first of its kind in the country. It has a model in Los Angeles, Chicago and New York as well.

The club is chartered by the California Democratic Party and is dedicated to electing pro-arts candidates to local, state and national office and to bringing issues of importance to our membership, to the public and to our representatives through our monthly forums.

What I'm going to speak about is just on a little broader basis from what you've heard previously. Our executive committee gives its unanimous support to the federal resale royalty proposal to be administered by the US Copyright Office. We will be bringing this before our full membership this coming Monday, January 27, for their approval.

This legislation is overdue nationwide. I want to talk about artists as productive and voting citizens, who are entitled to support and protection just as any other citizen or business in this country.

Artists and their related activities contribute dramatically to the economic and social well-being of our communities. In San Francisco alone, one in 11 jobs is arts-related according to a recent survey from our San Francisco Art Commission. This survey also showed that combined arts activities for both non-profit and for-profit arts, visual, performing, dance, medium, music,

contribute over \$1.5 billion annually into our economy here, making the arts in San Francisco the sixth largest industry.

However, support and incentives for individual artists are long overdue and are essential to the survival of this industry as a whole. As you well know, government funding for the arts is very limited and has become a political football in the last several years.

We are working very hard to educate our legislators about the economic benefits federal arts dollars have on our local communities. For every dollar that comes in, three dollars are generated locally. But there are few programs supported by the National Endowment for the Arts or state or local arts agencies that individual artists can apply for.

Where there are those monies, they are so limited and the demand is so much that individual artists really have a terrible time. Therefore, resale royalty revenues become an essential means of support, and we urge the continuation of this program here in California and nationwide.

MR. PATRY: Thank you very much. I'll leave the record open, of course, for any representatives of the other party who wish to comment.

The Copyright Office is a legislative branch agency, and we work both sides of the aisle; and, also for Mr. Sanders, who is an independent representing Vermont.

MS. BERLIN: Yes.

MR. PATRY: Mr. Davis.

MR. DAVIS: I have two more comments that I'd like to make very briefly. One is, in your questions to Professor Goetzl, you noted that the California Resale Royalties Act only operates on the overall resale price. You seem to pose a question as to why there rather than on the profit.



I spoke with the fellow who drafted, or one of the drafters of the original Resale Royalties Act, Hamish Sandison, and asked him that same question. He said that they had thought about that quite a bit before drafting the statute and decided to structure it that way because of the expense and encumbrance of trying to establish what actually was a true profit on one small transaction carried on by say, a gallery or an auction house that carries on a lot of transactions.

Once you begin to try and calculate what a profit is, you very quickly and not inappropriately get into questions of whether one includes indirect as well as direct costs of making the sale -- whether the cost of paying rent on the auction house and lights for it and transporting the art and insuring the art come into play. Once you get into that, you get into a very extended assessment for a very unextended transaction.

So, trying to keep the right as simple and uncomplicated as possible, they decided to apply a very small percentage to the gross resale price rather than a larger percentage to the profit.

On another point, with respect to alternative dispute resolution, I would urge Congress, if they enact a resale royalty right, to use an alternative dispute resolution scheme. If they do decide to create a cause of action, they should certainly include a right to recover attorney's fees, whether those are incurred in the alternative dispute resolution procedure or in court. This is because the cost of hiring a lawyer -- even if it's only \$100 or \$200, is going to be a deterrent to the enforcement of these rights.

MR. PATRY: Of course, the Copyright Act now has a provision on attorneys' fees, but it's a bit bifurcated. For the Visual Artists Rights Act, registration is not a prerequisite to getting attorneys' fees in cases initiated

pursuant to the Act for a number of reasons: one is that it's different from the economic rights that one registers, and it's conceivable that the owner of the economic rights who would register the work might not be the same as the original artist.

But certainly for the economic rights in Section 106, registration is a prerequisite to getting attorneys' fees. If the work is infringed before it's been registered, then you don't get them.

There was some discussion, I believe, by Professor Goetzl about having a registry system. Would you favor any sort of tying -- similar to what is now done for statutory damages, to encourage people registering their works with whatever applicable agency by pegging attorney's fees to that, or should it be a more liberal approach which is simply that you get attorney's fees because they are a necessity for enforcement?

MR. DAVIS: I think I would more readily agree with the latter point. This is because I don't think that most artists know the ins and outs of the copyright laws and what they need to do to protect their rights in the future, and frankly, don't spend a lot of time thinking about those problems as they're producing their art and going out into the world.

I think that the typical artist's relative unfamiliarity with the law and the requirements of business practice is something that ought to be kept in mind as you structure the set of rights you're going to create here.

MR. PATRY: Thank you very much. Any other comments from the panel?

MS. BERLIN: No. I just have one question. If you're thinking about setting up an agency to monitor, like an ASCAP kind of agency, who pays for that? Is it going to come out of the artist's royalty? I would hope, obviously, that it does not come from the artist's royalty.



MR. PATRY: There are problems, of course, in setting up any federal agency to do that. ASCAP, of course, is a private agency. It's also non-exclusive which is another difference.

In Europe, they don't have the same problems with antitrust laws that we do here. ASCAP and BMI have to have non-exclusive licenses, so that the copyright owners can both do it directly and indirectly. Certainly that is an issue that would have to be worked out.

I think ASCAP/BMI's overhead is surprisingly low compared to some charitable organizations. But I think it would be difficult to have a federal system of enforcing rights through a collecting society like ASCAP or BMI. But that obviously seems to be a critical issue of enforcement, and it's one that would have to be explored thoroughly. Presumably, you wouldn't want a situation where the cost of overhead swallows up the remuneration that you're trying to give to people.

Thank you.

MR. DAVIS: Thank you.

MR. PATRY: Our next witness is Professor John Henry Merryman, who I see in the audience. Professor Merryman is Sweitzer Professor of Law and Cooperating Professor of Art, Emeritus at Stanford University. Among other activities, he is President of the International Cultural Property Society and Chairman of the Board of Editors of the International Journal of Cultural Property. He is a very well-known author. His treatise, "Law, Ethics, and the Visual Arts," co-authored with Professor Elsen, is very well known.

His article in the Hastings Law Journal on the Refrigerator of Bernard Buffet is really a landmark in the field, and these are just the tip of the iceberg of his contributions.

Professor Merryman, it's an honor to have you here today. I appreciate your driving up from Palo Alto.

PROFESSOR MERRYMAN: It's an honor to be here today, Mr. Patry. Thank you very much. I would add, if I may, to the identification material that I am chairman of the visual arts division of the American Bar Association's Forum Committee on the Entertainment and Sports Industries.

MR. PATRY: Thank you.

PROFESSOR MERRYMAN: I have a prepared statement which I do not propose to read.

MR. PATRY: Thank you.

PROFESSOR MERRYMAN: Unless you insist.

MR. PATRY: No, I shan't.

PROFESSOR MERRYMAN: I'll be happy to give you copies.

MR. PATRY: Thank you. I appreciate that.

PROFESSOR MERRYMAN: How many would you like? You may have up to four.

MR. PATRY: If you have a copy, I'll be glad to put it as a part of the hearing transcript and the record, if you like.

PROFESSOR MERRYMAN: Is one enough?

MR. PATRY: One is fine. You're a well-practiced witness, I can see.

PROFESSOR MERRYMAN: No. Hardly. What I would propose to do is emphasize a few points and then try to respond to any questions.

MR. PATRY: Okay.

PROFESSOR MERRYMAN: The first point -- and most of this, by the way, I'm sure is already quite familiar to you. I apologize for stating the obvious, but sometimes it may be useful.

The resale proceeds right was first adopted, in France in 1920. Twenty other civil law nations almost immediately followed suit in enacting similar legislation. However, in most of those nations, it is a dead letter.

The resale proceeds right or droit de suite today really has no force or effect in any countries other than France, Germany, and Belgium. In France, the home of the resale proceeds right, it applies only to resales at public auction. It does not apply to resales by galleries, and it does not apply to private resales.

There's an interesting internal French complication about this because if you read the statute, it appears to apply to gallery sales and even possibly to private sales. But the necessary regulations have never been issued by the state because the state does not want to promulgate a law that it fears it cannot enforce. So, in France, it applies only to sales at public auction. None other.

In Germany it applies to sales at public auction and to dealer sales. It does not apply to private sales. Furthermore, in Germany, the statute, which provides for a five percent resale proceeds right, has actually been replaced by an operating agreement between the professional association of German art dealers and the professional association of German artists called Bild-Kunst.

Pursuant to that agreement, with which I see you are familiar, --

MR. PATRY: Yes.

PROFESSOR MERRYMAN: -- there's actually a one percent override charged by these dealers on all sales of contemporary art in Germany. That's paid over to Bild-Kunst. Bild-Kunst uses it in part to pay royalties to the artists themselves, and part of it goes into an artists' welfare fund, if I have been reliably informed.

Even in France and Germany, there's no attempt to regulate private sales outside the auction and the established dealer market. In France, there's no attempt to apply the right other than to public auction sales.

Another point I would make is one that is made -- at perhaps unnecessary length -- in the prepared statement I gave you. This basically criticizes the argument favoring the resale proceeds right. The position I take is that the resale proceeds right would harm the primary art market.

What we should be doing is trying to strengthen the primary art market for the great mass of worthy but unrecognized artists. Any realistic prospect of return from his or her work as an artist is in the primary market. Anything that can be done to strengthen that is something that all who are interested in the arts wish to support.

The resale proceeds right has a depressive effect on the primary art market. It reduces the strength of the primary art market, and this operates to the disadvantage of all but an extremely small number of already successful, recognized, wealthy artists.

Jasper Johns is a multimillionaire. Robert Rauschenberg is a millionaire. Picasso was a billionaire. Those people do not need resale proceeds. The 99.99 percent of living artists who have no resale market whatsoever and who have no prospect of ever getting a nickel out of a resale royalty will suffer if it is enacted because of the depressive effect on the primary market.

Let me give an example. Suppose that a dealer who has a gallery on Grant Street in San Francisco is an enthusiastic supporter of worthy but relatively unrecognized artists. He enjoys showing and promoting their work and trying to help them achieve success. Suppose this dealer has an exhibition of

the work of one of these artists in which twelve canvasses are hung. Suppose it's an unusually successful sale, and at the end of the month, all twelve canvasses have been sold.

Suppose that they have sold for prices in the area of \$5,000 each or \$4,000 or something of that sort. The dealer, glowing with the success of this operation, gets together with his accountant and adds up the proceeds for the month and discovers that he still lost money. Now, how does that dealer stay in business?

The way the dealer stays in business is by entering the secondary market. He buys a Rauschenberg drawing or a Jasper Johns fine print or a piece of sculpture by a well-known artist. He resells it to a museum or a collector or to another dealer for a substantial profit. The secondary market activity that this dealer engages in is what enables him, unless he is independently wealthy and using his private fortune for this purpose, to keep the front room of the gallery open and running.

To the extent that the resale proceeds right takes some measurable portion of the profit from the secondary market activity, it reduces the ability of the dealer to support the front room. As a result, he will have to have fewer shows of unrecognized artists. He will have to have less publicity. He will have to move to a location where the rent costs less. He will have to have less opulent openings.

He may actually decide just to go into the private art business and deal only in the secondary market rather than to continue to deal with the primary market. This is one homely example of the way this kind of thing can work.



You're familiar with the Tom Camp article that was published in your journal, the Bulletin of the Copyright Society, I believe.

MR. PATRY: Yes.

PROFESSOR MERRYMAN: That's the only empirical study I know that has attempted to identify, to find an answer to this question: what proportion of living professional artists have a resale market? The result of the Camp survey was that, during the period from 1972 to 1977 the number of living American artists who had any resale market, so far as one could judge from the records of the two major American auction houses, Christie's and Sotheby's, was under 150.

At that time, the number of persons who, in response to census questionnaires, identified themselves as professional artists was over 200,000. Today that number is over 400,000.

Perhaps there are 300 artists living today whose work has any significant resale market. That means for the remaining 400,000 artists, there is no immediate actual prospect of gaining anything from the resale proceeds right. At the same time, as I have perhaps stated too many times already, the right is depressing their prospects of success in the primary market.

It is not idle to point out that art is easily transportable and money is easily transportable. The enactment of a resale proceeds right in the United States will certainly weaken the United States art market, which is currently the strongest in the world. It will weaken the United States art market to the advantage of the art market in London and the art market in Switzerland. In neither of those nations do you have resale proceeds right laws. Neither is about to institute them.

Recall that in California, when the resale proceeds right law was enacted, Sotheby's, which at that time was regularly conducting sales of



contemporary art, immediately stopped those sales. It later, for a variety of reasons of which this may have been one, totally closed its operation in Southern California. But while it remained open after the enactment of the retail proceeds right, it terminated all sales of contemporary art.

Any national resale proceeds right is bound to have some repercussion in the art trade in the United States, a negative repercussion to the advantage of nations whose markets are not encumbered by the resale proceeds right.

At one time a group of concerned citizens of California consulted with then-Senator Alan Sirotti, the California legislator, in an attempt to get him to introduce amendments to the California resale proceeds rights statute. One of those amendments, if it had been introduced and enacted, would have provided that funds received under the statute would not be paid to individual artists, but instead be put into a welfare fund for artists.

Artists have a number of problems that other people don't ordinarily have. For example, how do they get health care? They don't have regular incomes. They don't work for corporations that have health plans and so forth. But they have a variety of other problems of the sort that beset people who do not have a safety net under them.

The idea was, if we're going to have some sort of an excise tax on art market transactions, which is what the resale proceeds right in California is, what would be the best way to use the proceeds from that right?

It was our feeling at that time that if you're going to have a proceeds right -- which we thought was not a good idea because of its impact on the market -- then it would be better to use the money that came from it for the benefit of all artists rather than just for the benefit of the few very, very

successful artists who really don't need it the way most other working artists do.

The sum of my presentation at this point -- and I'll be happy to respond to questions if you have any -- is first we ought to be concerned about strengthening the primary market, because that will do the most good for artists. Second, if we're going to have a resale proceeds right, I think the better way to use the proceeds is to make them available for the welfare of artists more generally rather than only for the already fortunate few who happen to have a resale market.

MR. PATRY: Thank you very much. The situation in Europe, I think, is an interesting one that way.

This summer, I spoke to the people for Bild-Kunst and ADAGP, the French collecting society, representatives of the art galleries and Madame MontLuc, who is the chief of the Bureau of Intellectual Property for the Ministry of Culture.

You're certainly correct that the French law, which I think everyone believes does, in fact apply to galleries, is not enforced, as you mentioned. One of the reasons I was given by Mr. Dauberville, who was the head of the French galleries, is that they contribute money to a sort of social security fund. In Germany, the collecting society, Bild-Kunst, also has a social security and health fund for artists which, in part, is paid out of droit de suite.

We would have to address this issue probably in the context outside of the Copyright Act, but it is something certainly to consider.

One of the things that we're trying to find out -- and your comment was very helpful this way -- is more about the nature of the art market, if it is indeed as portable or fungible as people say. You don't have the choice of

saying, I don't want to collect younger artists. I'll collect Monets or Cezannes. They're a bit more expensive though.

It will be helpful to have some sort of empirical data about what's happened in California since 1977. Other than the Sotheby's example, have sales gone to Nevada or have they gone to Switzerland or London? Or have people, simply stopped being dealers or gone entirely into the secondary market?

That's important, if Congress is going to legislate. They want to make sure that the benefits of any legislation outweigh any negative effects -- not only so that they insure that they're not going to harm one group of people, but also so that the benefits that they're going to give to another group are commensurate. It's difficult, I know, to define the empirical data.

The portability issue may be of less of a problem, at least for us than Europe because if you have only one state that has a resale law, then you run into arguments that, well, the market is going to go to New York or Nevada or wherever else. If you have a federal law, of course, then that's probably not a problem.

Then you go to the other considerations you mentioned, such as Switzerland, London, and other places that don't have droit de suite. The European community, of course, is looking into this. Many people believe the ultimate result will be there will be an EC directive mandating a droit de suite provision.

That gets to the principal point of this rambling comment of mine which is, does it really get down to money? Is it not so much whether to have a droit de suite, but how much it costs. How much of a problem is one percent? It is a little different from the seven percent provided in the original Kennedy

bill of course. Also is it one percent of profits or one percent of something else. What is the enforcement mechanism?

French gallery directors and auctioneers reported that as business people, they were less concerned about principle. Americans might think that the French are more concerned about the purity of the law than anything else. It was refreshing to talk to them and hear that as business people at least, they didn't care so much about the principle of droit de suite because they had a lot of other concerns.

For example, while I was there, there was a big controversy over a value-added tax that the government had instituted; it was much more important to them than the droit de suite percentage. What they cared about, again, was the amount of money and how the right is enforced.

If you did have a harmonized law, federally or throughout Europe, and a particular amount, would that have the depressing effect? In other words, it seems to me from what I've learned so far, the question is really whether droit de suite is a philosophical political problem or one that has to do with amount and making sure that everybody pays the same amount?

PROFESSOR MERRYMAN: Well, certainly, the California experience is not a very good place to look for empirical evidence on the kinds of questions you just raised, because the California statute has been largely ignored in practice. It is sporadically observed at best and sporadically enforced. It is for that reason alone -- the sort of thing that, as a technical lawyer interested in laws that work -- wishing to avoid laws that are interesting rhetoric but don't have any important social effect or at least not the effect you wanted -- that one objects to the California statute.



But that could be presumably fixed by approaching this thing in an entirely different way. If one can somehow think of a way of drawing from the art market some realistically modest flow of money and putting it to work in a way that will be of benefit to artists more generally than the artists who happen to have a resale market, then clearly there's no principled objection to that. That sounds like a wonderful idea.

It also sounds a little bit like a free lunch. Even if the royalty is relatively small in scale, it is still going to be, to some extent, an impediment to or a burden on the market. Then the question is as you've stated, is the gain worth the cost in that situation? That's a calculation that I'm certainly not qualified to make in the abstract.

I like the German system of an override on sales of contemporary art because we're really talking about only the contemporary art market here -- a flat override of one percent perhaps, which is currently, I think, what they're using in Germany, which goes into a fund that is for the welfare of artists. That would strike me as socially desirable and as placing a minimal burden on the art market and at the same time producing substantial funds.

In California, the contemporary art market is substantial. In the United States, it's very substantial. One percent of that a year could rather quickly produce a substantial fund. Then the question is, how do you administer that money? How do you administer that welfare system?

One way to do that is to set up or arrange for the setting up of some private non-governmental way of dealing with it. Another way is try to do it with a governmental agency. Both of them have advantages and disadvantages. I'm sure you've thought about this already.

MR. PATRY: I have a technical copyright question, because any time Congress legislates, you have to make sure that you have the authority to legislate and are fulfilling the purpose under which you're legislating. Congress can't just simply legislate because it wants to. It has to do it commensurate with some power it's been granted by the Constitution.

Copyright acts have been enacted based on Article I, Section 8, clause 8. It would seem to me that a droit de suite provision would be based on that section. It's at least logical that one consider it a copyright-like right.

The difficulty I have is this -- how would one define the protected subject matter? This is not a problem in Europe because they don't have our constitutional provision; they protect certain things under unfair competition. What I'm thinking of are things that may not be subject to copyright -- furniture, really good-looking toasters. Something that, perhaps, might not be protected under our federal system, but within the art market -- for the person who created it, the collector or the public -- it might be considered art.

One of the concerns, certainly, that people have in Washington, people outside of the Beltway too, is not getting Congress involved in defining what is "art." In Europe, at least I was told by the Germans and the French, they do protect things that might not be protected under a copyright here. What matters is that the market considers it to be art. That would be a problem for us.

PROFESSOR MERRYMAN: That's a problem that was also faced in developing the moral right legislation in California. You're familiar with the provision covering works of art of recognized quality.

MR. PATRY: Which we declined, respectfully, to adopt federally.



PROFESSOR MERRYMAN: Yes. I understand. There were a lot of good reasons for that. But it's a question that can be faced in a variety of ways. One of the ways to face it is to say whatever the art community considers art is art. Whatever artists make is art. Then you have the question, well, how do you tell whether he's an artist. Well, you say if he makes art, he's an artist, and it gets a little circular.

But somewhere in there is a realistic kind of easily operable procedure which is that, if in the art world this is considered art, then it's art for this purpose. If you have a dispute about whether the art world considers it art, then you have experts come in and you make a finding of fact.

MR. PATRY: Presumably, we could. So, you would protect things like furniture or things that might not be subject to copyright, some sort of useful article, in the technical copyright sense.

PROFESSOR MERRYMAN: Yes. I would say, depending on what your objective is, if your objective is to stay within the terms of the copyright statute, then I wouldn't do that.

MR. PATRY: Right.

PROFESSOR MERRYMAN: If your objective is to try to establish a measure that would apply generally in the art market, then I would take a different view.

MR. PATRY: Similar to Ven diagrams, where the areas overlap. But there might be areas where they don't, and presumably you can legislate them under the commerce clause.

PROFESSOR MERRYMAN: Well, of course. The commerce clause has been, up to now, infinitely elastic. Presumably, this could be done under the commerce clause.

MR. PATRY: Okay. Great. Thank you very much. I appreciate your coming. It was very, very helpful.

PROFESSOR MERRYMAN: Thank you for hearing me. I take it you're familiar with the Balch studies and all the articles in this field.

MR. PATRY: I don't think I've read all of them, but before June, I will.

PROFESSOR MERRYMAN: They're all cited in my submission.

MR. PATRY: Thank you very much. We have one final panel here which consists of Eleanor Dickinson, Richard Mayer, and Ruth Asawa, and Jerry Carlin, but first we'll take a short break for the court reporter.

[Short recess]

MR. PATRY: All right. You may proceed as you wish. As I mentioned at the beginning, everybody has the opportunity, if they wish to take it, to submit written comments later or any documentation you want.

MR. CARLIN: I'm sorry. I arrived late. And I don't know your name.

MR. PATRY: Oh, it's Bill, and it's "P" as in Paul, a-t-r-y.

MR. CARLIN: Thank you.

MR. PATRY: I grew up here, and I should have known it would be this cold.

MS. DICKINSON: It's just this room.

MR. PATRY: Proceed as you wish. Dick, if you want to go first, go ahead.

MR. MAYER: Thank you, Mr. Patry. My name is Richard Mayer. I'm a sculptor and vice president of National Artists Equity Association. I live in the Carmel Valley.

On September 22, 1976, a longtime dream of Artists Equity became reality when Governor Jerry Brown signed the California Resale Royalties Act, authored by then-Assemblyman Alan Sirotti. Thus, California became the first, and so far, the only state in the nation to enact resale royalty legislation for artists.

When Assemblyman Sirotti received his copy of the signed bill, he discovered that Governor Brown had written across the top "what hath art wrought." What art had wrought was a not-so-quiet revolution in the arts with more to come.

In May, 1977, I asked Golden Gate University Law School Professor Thomas Goetzl to develop a preliminary or discussion draft of a moral rights bill that would protect art works from intentional mutilation or destruction after they leave the artist's possession. The next month, on behalf of Artists Equity Association, I sent Professor Goetzl's draft to Alan Sirotti who had by then moved up to the state Senate.

Senator Sirotti soon introduced SB668, the California Art Preservation Act. After two years of strenuous lobbying by artists and other supporters of the bill, including Professor Merriman, I might note, Governor Brown signed the first moral rights bill into law on July 27, 1979.

While the Art Preservation Act received general approbation in the art world, the Resale Royalties Act generated unprecedented dust clouds of controversy, more than can be explained by economics alone. When the dust settled, it became evident that these two new laws had altered the landscape of relations among the elements that comprise the art world.

Artists had acquired in California a new legal umbilical to their work after it was sold. They were now able to preserve the integrity of their

work. Also they had acquired the means to move from their prior passive status and become active participants in art world economics.

From the beginning, it was Artists Equity's hope that the California legislation would stimulate the enactment of similar laws in other states -- which it has -- and that ultimately, federal legislation would be enacted which has also come to pass with the Visual Artists Rights Act.

Understanding that the copyright office is mandated under this legislation to study the feasibility of implementing a federal resale royalty law, it seems appropriate indeed that this first hearing be held in California. In California, we can demonstrate the feasibility of resale royalties. Despite the problems inherent in the state legislation, the California Resale Royalties Act does work for those artists with the will to implement it.

Of course, the benefits that accrue to artists from the California royalty law represent the smallest fraction in comparison to the potential of a national law. While many instances can be cited, such as the \$3,700 royalty forwarded to Frank Stella by the California Arts Council, or the Berggruen Galleries payment of a \$500 royalty to the painter Joan Brown when the gallery resold her painting "Marilyn SV" for \$10,000 -- I might add parenthetically, earlier she had received a \$300 royalty from the Hoover Gallery in San Francisco when they sold "Marilyn SV" to Berggruen. I also might mention a modest \$50 royalty that I received when the Mark Hopkins Hotel resold a sculpture of mine to Marshall Weissman.

I would particularly like to bring to your attention the experiences of two eminent California artists, the sculptor Robert Arnison and painter Mel Ramos. Each has written to me expressing regret at not being able to speak in

person at this hearing, and each has asked that I read his letter into the record.

MR. MAYER: Robert Arnison states -- this is a letter addressed to me as vice president of National Artists Equity.

"Dear Richard, I am pleased to hear the United States Copyright Office is holding a hearing to evaluate the possibility of artist royalties. I am sorry that I cannot speak at the hearing on January 23. Since I cannot attend in person, I would like to relate to you some of my experience as an artist benefiting from the California Resale Royalties Act.

"My sculpture, 'Assassination of a Famous Nut Artist,' 1972, was originally sold in '72 for \$1,200. In 1979, it was resold for \$7,000, and in 1980, it was resold again for \$14,000. The artist received a five percent royalty on each of these resales.

"Perhaps a more dramatic example, I originally sold my early sculpture, 'No Deposit, No Return,' in 1961 for \$25. Recently this same work was resold for \$34,000. This is by no means an exhaustive list of resales of my work. In the last eight years, I have received resale royalties amounting to \$25,520. My experience is not unique.

"I know of many other artists who have received similar recompense. If the principle of the California law were applied throughout the nation, it would be a great benefit to artists. Sincerely, Robert Arnison."

MR. PATRY: Thank you.

MR. MAYER: Mel Ramos states, again, writing to me as vice president of National Artists Equity, "I will be out of the country on January 23, and I regret that I am unable to attend your meeting. However, I would like to pass



along a brief description of my experience with the artists resale law, Section 986 of the California Civil Code.

"In 1988, I began to take the provisions of this law very seriously when, for the first time, a painting of mine from 1963 was sold at an auction house in New York for a considerable sum. Up to this point, my work was being auctioned for prices below what the galleries that represented me were selling it for.

"Since 1988, I have earned about \$20,000 in resale royalties. This was not done without effort on my part. When I realized that my work was coming up for auction at Christie's and Sotheby's with increasing regularity, I went to the local law library and obtained a copy of Civil Code 986 and studied it very carefully.

"Subsequently, when the auction houses publish their catalogs, I am informed of pending sales and I send letters via Christie's and Sotheby's to sellers of my work who reside in California, reminding them of their obligation under this law. The auction houses will not give addresses of California dealers, but they will forward mail.

"During the buying/selling frenzy that occurred in the late eighties, I had many works come up for auction. The vast majority of them were from foreign sellers and I have determined that if there had been a federal law similar to California's in place during the late eighties, I would have collected over \$100,000 in resale royalties."

This addresses a point that Professor Merriman made. "I know that one of the arguments against such a federal law is that it will hurt your career and alienate collectors. However, this argument does not affect me so much because of the limited audience for my work. I do not have such a broad and vast

audience that makes my tax situation require that I donate all resale royalties to charity."

If I may paraphrase the artist here, he's referring to the suggestion that royalties ought to go to some charitable fund to benefit poor artists. What he's saying here is that he needs the money.

I can't resist asking parenthetically also, do rich attorneys and law professors contribute to a welfare fund for poor lawyers? I don't know.

Continuing with the letter -- "I have found that most of the people who sell my work for more than they paid are quite fair about it. This is not to say that some ill-feelings were not provoked in a couple of occasions. But in these cases, it would have happened for some other reason.

"I am a collector of art, and I have no trouble paying an artist a resale royalty. The only reason that I would do such a thing, obviously, is because I made money on the deal. Sincerely, Mel Ramos."

These artists have found a way to make the California royalty law work for them. Another example is instructive to other artists. Public policy-makers can also learn from their experiences and the experience of other royalty recipients we will hear about today -- that artist resale royalties are feasible, both in theory and in practice.

Federal District Judge Robert Takasugi, in his judgment upholding the constitutionality of the California Resale Royalties Act declared, quote, not only does the California law not significantly impair any federal interest, but it is the very type of innovative lawmaking that our federalist system is designed to encourage.

The California legislature evidently felt that a need existed to offer further encouragement to and economic protection of artists. That is a

decision which the court shall not likely reverse. An important index of the moral and cultural strength of a people is their official attitude toward and nurturing of a free and vital community of artists. The California Resale Royalties Act may be a small positive step in such a direction, close quote.

Let us return to the event that triggered the movement for artists royalties in this country, the resale of Robert Rauschenberg's painting "Thaw," by Robert Skull -- that is the resale by Robert Skull -- for \$85,000 in 1973. Skull bought the painting in 1958 for \$900. What if Rauschenberg had stopped painting in 1960? Is it likely that Skull could have realized a profit of \$84,100 by selling "Thaw" 13 years later? No, not very likely.

It was Rauschenberg's commitment to productivity and growing excellence over the 13-year period that drove up "Thaw's" value. "Thaw's" value in 1973 was a function of Rauschenberg's history as an artist. The principle of artist royalties recognizes this simple truth. The worth implicit in a work of art resides not with the object, but with the artist who created the object.

As Judge Takasugi suggests, isn't it now time to build upon the small positive step taken in California and establish the principle of artist resale royalties in federal law? Thank you.

MR. PATRY: Thank you. Ms. Dickinson.

MS. DICKINSON: My name is Eleanor Dickinson, and I'm a visual artist. I'm vice president of Artists Equity Association nationally, and I'm vice president of California Lawyers for the Arts. I live in San Francisco, and I am a professor at the California College of Arts and Crafts in Oakland.

I have maintained a studio in San Francisco for many years. We moved to California in 1953, and I've been involved in artists' rights since then, since about 1957. I regularly teach gallery and museum management in addition

to drawing, so that I have a great deal of contact with galleries and with the economic situation of artists selling and so forth.

My prices for art have increased slowly over the years. The art works are created as an important need in my life, not primarily for profit. Nevertheless, art is very expensive -- art materials, travel, models and maintaining a studio, and so on. The increasing value and prices of my work are very necessary to continuing to produce the art.

There is a hope, in time, that the resale royalties may help in the support of making the art. I've worked very hard for many years to bring my art to this high level, like most artists. Like most artists, I work about 90 hours a week. I object to Professor Merryman's saying we want a free lunch. I don't know any bunch of people that work harder than artists and for fewer financial rewards. To say that we want a free lunch is snotty.

I'm not a millionaire artist. I'm not Rauschenberg. I'm not making a fortune off of art. I strongly support this Act. Long ago, through Artists Equity, artists asked for one percent of the profit from sales of art. The galleries and collectors laughed at us. By the time it's legislated, it's five percent of the entire amount.

When Professor Merryman suggests that one percent might be acceptable today, again, I find that almost patronizing. We have not been rapacious. We want something back for all those years of effort, for our hard work that has made the work go up to these astronomical prices.

It seems to be urged that only very well-off artists are going to benefit from this law. This is nonsense. \$1,000 for a work of art today is not an astronomical price. People are able to make time payments and pay on Mastercharge and Visa. Every magazine you open urges people to buy art. It is

the chic thing to do today. It is not a rare occurrence for someone to buy a work of art for \$1,000.

My prices range from \$50 for a signed-off set to \$12,000 for a major painting. Most of my sales are in the five-to-\$900 range at the moment. So, I can reasonably expect to collect royalties in the next few years. It's kind of like a farmer planting seed. Eventually, you expect to have a harvest. In that harvest, you will have seed for further growth. I don't consider this rapacious. I don't consider this a ridiculous thing. Although I'm not primarily thinking economically about my art, I have to be practical about it in order to support it.

It's been asked many times how one keeps track of sales of art. I don't find this as difficult as it might seem to be. Most people who buy your works of art on resale will call you. They always have an excuse, but they really want to know what your prices are now. They also want to know more about the work of art and how to take care of it. I get calls all the time. My impression is that there is heavy resale going on. One thing that has helped in that is, Artists Equity in California sent a letter out to every gallery pointing out to them that the California Criminal Code requires that when there's a sale of art, that the gallery or museum notify the artist of the name and address and price of that purchase, so that the artist is able to contact people who bought their work. We found so many galleries who were saying they never heard of Resale Royalties that we just mailed information to every gallery. I cannot conceive of a California gallery today saying they haven't heard of this law.

Another thing that I do -- and I brought copies of these for you -- is, on the back of every work of art that leaves my studio is one of these forms. It gives conservation information. It gives hanging recommendations. I give



some information, technically, about the work of art. But down at the bottom is a statement that "if this work is sold at a profit and for over \$1,000, a royalty of five percent may be due the artist from the seller. The increasing value of this work is due to the continuing efforts of the artist. The buyer is asked to report the sale to the artist at the address given for documentation, possible photography, and possible loan to exhibitions. The artist will then furnish a free appraisal of the work to the buyer for insurance purposes and consultation on its condition and framing." I find this a very reasonable exchange of services and one that will almost guarantee that when there's a sale of my work, people will contact me, though I suppose people could cheat. Here is an example -- recently, friends told me a work of mine was on display at a gallery in San Francisco. It vanished. Presumably, it was sold. So, I contacted the gallery owner. These are not hard things to come up with. I really think that the voluntary system has far more going for it than one would think.

A fear of blackballing has been mentioned a good bit. The California law allows people to use a third party. When I take my classes touring to different galleries, I am really quite surprised to find major gallery owners -- I have two of them on tape -- explaining that they do not pay the resale royalty to their artists because their artists don't want money. I can hardly believe it when I hear them saying this. In one case, I know that the artists from that particular gallery have been meeting for some time to try and figure a way to extract the money owed them from the gallery owner. But they are afraid of him. When you have a third party involved in the collection, it makes it a lot easier because then those artists can say, oh, we didn't know anything about it. But they will get paid.

One thing you get asked is will the artist pay the collector back if the price goes down, not up. Well, if the wine that you order is disappointing, does the vineyard pay you back? I mean, you do take a chance in any purchase. Most people who buy art buy it because it's prettier than stock on their wall. They've had the enjoyment of the art over the years. If they wish to sell it and the price has gone down, they, after all, have had value for it. In most cases, they could go back to the artist and most artists will allow a trade-in for another work of art. It is somewhat silly to ask about that. There are a great many economic transactions where there is a potential profit but not necessarily reimbursement, so, I don't know why the artist should be considered as different.

There was a question about how big the resale market is, and I'm really sorry that Clare Carlavero owner of the Art Exchange Gallery, was not able to come today. I believe she's sending you a statement. She started the first secondary market gallery here. She found, much to her surprise, she was in the black the first month. There is a heavy resale market -- a great deal of art being sold and resold. I think this Resale Royalty Act applies to a great many more artists than you think.

Another comment that I have heard is that the auction houses particularly objected to the five percent royalty payment in California, saying it would drive art sales out of California. I found that really quite surprising, when the next year they added five percent for their own account, and that was never mentioned. It used to be that they charged five percent to the seller. Then they just quietly started charging five percent to the buyers, so they now get ten percent. That was never mentioned. So, for a group that has been adamant that no one would support a five percent increase, that seemed to me pretty ridiculous.

You also were asking about how to define art. I would recommend that you not try to define art. Define artists, and use the IRS standard for it. You have one built into law. They have ten standards for how to determine a professional artist. You can just use the ones that are already in place. That might make it a little easier. I suppose an artist might create something that was not art, but you could always fall back on expert testimony.

On the proposal about Resale Royalty proceeds being put into a fund for artists, I'm not sure about that. It does seem to me that artists badly need health benefits and a number of other things, but I would prefer to see those addressed in other ways. I do think that this survey that we're doing will indicate to you that even the beginning artists, the ones who are selling for very modest prices, do have an expectation that this resale royalty is going to benefit them in time. I think that will make a very big difference in their attitude about it.

I think as much as anything, the idea that our culture values what they do and that there is an acknowledgement of the artist, and a continuing interest in their work, is of great importance. I'm sure that as you work it out, whether it's five percent or seven percent, how it is administered is less important than that we get this ad in place nationally, to respect and value our artists. Thank you.

MR. PATRY: Thank you.

MR. CARLIN: Yes. My name is Jerome Carlin. I'm a painter. Some years ago I was active in helping to set up the Bay Area Lawyers for the Arts and was the first chairman of the organization.

I'm here just to state briefly that I believe very strongly that all artists should have a right to a portion of the appreciated value of their work.

If my actress wife is in a film or a commercial, she gets a residual if the work is continued to be shown and further profit made. It may be easier to monitor these transactions, but that doesn't mean that we visual artists shouldn't try. I believe very strongly that it's going to be much easier if we have a national resale royalty law.

Just a brief comment on the impact of the California law on the art market. I found an argument that kept being repeated in a strange circular manner. On the one hand, it was said that this law had some very damaging effect on the art market, unsubstantiated by any significant evidence or facts. Then on the other hand, it was said that, well, it doesn't make any difference because nobody is enforcing the law.

I think the argument about its impact on the art market is spurious. Clearly, if it becomes a national law, I think that's largely irrelevant. But I do, as an artist, urge that the opportunity not be missed, after fifteen years, finally to bring this to fruition. Thank you.

MR. PATRY: Thank you.

MS. ASAWA: My name is Ruth Asawa. I'm a sculptor. I live in San Francisco. Most of my work has been commissioned for public places. When Ghiradelli Square was sold, I approached the owner, and he was willing to help me get royalties on that. Although he made a huge profit from the complex, my choice was to get an evaluator or an appraiser for the fountain itself.

At that time, we went to the foundry and asked the foundry what it would cost at that time to recast and make the fountain. At that time, we came to an appraisal of \$100,000. So, the owner paid me \$5,000 for it.

When the Hyatt fountain was first built, the construction of the building, the hotel cost \$34 million. Then, a few years later, it was sold for

\$72 million. I didn't know of this transaction. Then the last time it was sold, it was sold to an insurance company for \$123 million. I would not have know about that except that someone I knew was at an opening, and said, "Have you heard that the Hyatt Hotel sold?" I said, "No, I had no idea." So, he sent me an article from the "Chronicle" business section, and that's how I pursued it.

For that, I was paid \$7,000. But according to the sales record, I'm still owed one more sale, since it was sold twice. I'm not sure, I have to pursue that.

I have another commission where there were two partners, one partner sold his interest to the other owner. I have not pursued that; I don't know what I'm entitled to in that transaction. Also, I have not really pursued anything that was sold to a private collector. I have never had anything in that area. That's a very gray area for me because I have not really kept very good books on it, so I can't say very much about it.

Since everyone has spoken about everything else, I have nothing more to say.

MR. PATRY: From your experience, if they had benefited from the --

MS. ASAWA: If they had been under this, they would have. My husband is an architect and his fee is seven percent. His buildings have tripled in resale.

MR. PATRY: Does he get a --

MS. ASAWA: No

MR. PATRY: He doesn't.

MS. ASAWA: No. Architects do not get anything.



MR. PATRY: I've worked on the architecture bill, and the same day the Visual Artists Rights Act was passed, Congress passed a bill giving protection for the first time for built structures.

MS. ASAWA: Is that in place now?

MR. PATRY: Yes. As of December 1, 1990, we now protect architecture.

MS. ASAWA: Architects?

MR. PATRY: Not just the plans, the building.

MS. ASAWA: The building?

MR. PATRY: It is interesting, and it leads me into a question. The architecture bill, as originally drafted, would have given architects certain moral rights to prohibit certain alterations. But they didn't want that, so Congress took it out.

One of the things that interests me -- because I did testify with the Copyright Office on the Visual Artists Rights bill and on droit de suite -- is really the rather different reactions. I think you referred to this. My question is, why do you think there is this opposition to droit de suite from the same people who support droit moral?

MR. MAYER: This is really the first labor-management dispute in the art world.

MR. PATRY: Okay.

MR. MAYER: The resale right really has to do with redistributing the money flow within the market place. This happens all the time in our society. Our society is about redistributing the flow of money in the market place, depending on what factors are able to hold sway from time to time.

It seems to me that the argument that this will hurt the primary market, that this is really going to injure artists more than help them, is what I like to refer to as sort of the golden egg canard. That is, we're killing off the goose that lays the golden egg by seeking royalties.

If you look at the model of the labor movement in this country, that same argument was brought to bear against the workers who were trying to increase their share of the profits that were being realized as a function of their labors. The history of the economy in this country demonstrates that the workers did increase their share. As a matter of fact, it did not kill off the goose. We have a rather thriving economy in many respects, at least if you look at the stock market these days.

MR. PATRY: The other thing that interested me at the hearing was that some artists testified against it. Larry Rivers is one who testified against droit de suite, although originally he said he had supported it.

His argument was this: gallery owners and others took risks and supported these younger artists, and they should reap the advantages of it. The second part of it, though, which is one that you hear commonly, the second one was this -- at least for living artists, they do benefit because if something is resold at a higher price, presumably the works that this artist has not yet sold will increase in value. So, they should just simply be satisfied with that. That was Mr. Rivers argument, at least.

Now, that doesn't help you, of course, for the ones that you've already sold. It presumes that you have a stock of works that you have not sold yet. What would be your response to his comment?

MS. DICKINSON: If I could say something on that. The idea that artists should hold back their best work as they go along and then sell them as

their prices increase later -- I mean, it sounds good, maybe from a businessman's point of view. But most artists have a very hard time making the rent. To also pay storage and keep large stocks of older art -- most artists are not economically able to do this. If they have a buyer, they're going to sell. People are going to want to buy the best work now. You can't store your work for 20 or 30 or 40 years, air conditioning and all the rest of it in the hope that one day you'll be able to sell it.

MR. PATRY: That's your wine analogy, right?

MS. DICKINSON: Yes, right. Some times people will want your older work. I know Bruce Connor -- he'll have major shows. They want him to do all kinds of work fixing up these older works that have not been taken care of in the Museum of Modern Art in New York and so forth, and yet they may not buy the work that he's doing at the moment. But storing your best older work isn't really the way things operate for most artists. It may sound good, but it doesn't work. Regarding that testimony on the Visual Artist Rights Bill, the rumor is that galleries leaned on some of those artists to go down and testify against it. I'm very sorry they did. I think it is harmful to all artists to have that said.

MR. PATRY: Mr. Carlin, you mentioned that your wife gets residuals from advertising. That was presumably done contractually. But it's also probably a part of the labor agreement as well.

MR. CARLIN: That's right. It's the labor -- Artists Equity that helps to administer it. More accurately, Screen Actors Guild and AFTRA for TV and Radio.

MR. PATRY: One of the things that Congress has always --

MR. CARLIN: Actors Equity, I'm sorry.

MR. PATRY: Actors Equity. It had equity in there somewhere.

One of the things Congress is always interested in finding out about is whether things can be worked out without legislation. My father has this idea that before Congress can pass a new act, they have to repeal two others because he thinks there are too many laws.

So, one concern is the fact that you only pass laws when you need to pass them. That's not unreasonable. One of the things we're always interested in finding out is whether or not things can be worked out privately, whether through private contracts, or labor agreements, or stock forms. I certainly am aware of some of the counter-arguments.

But I'm just interested in finding out from you whether you think things can be done in the contracts that you have, or through some sort of collective bargaining or some sort of collective negotiations. Is that simply not feasible, that people don't have the strength, or --

MR. CARLIN: Well, one comment would be that I think we have had difficulty in enforcing and carrying this out in California. If we had some administrative system that could be worked out nationally along the lines of the system for the actors and performing artists -- that would make it simpler.

It is very hard to work this out on a private basis, as is shown by the evidence.

MS. DICKINSON: It is a very unequal bargaining situation. I've always felt bothered that many of our art laws have had to be Trust situations which status I understand is reserved for children and idiots. For me to feel that artists have to be in that category is sad. But it is a very difficult situation of unequal power.

I have very often seen an artist try to make a contract, even of the mildest kind, with a gallery and had the gallery cancel the show as a result.

Many galleries will not sign a contract. It means actually that the gallery is rather unbusinesslike because those contracts usually benefit both sides. But there are a lot of people in the gallery business for reasons other than business. They want to improve their drinking, their social climbing, their glamour, their sex life or whatever. I keep looking forward to the time when we have more businesslike galleries that will deal with contracts as labor and management. Because it benefits both sides to have no misunderstandings.

In my work in the college, I have done everything I could to try and get rid of the adversarial situation that exists by having student artists work in running galleries, seeing how difficult it is to do and how expensive. I think artists need to appreciate the galleries more. But many galleries also are unappreciative and think that they're the ones who create the value by selling the art. That isn't right either.

There is definitely an adversarial situation, and maybe we should all work on trying to change that.

MR. CARLIN: I would like to underline that. It's my experience that there's an uneasiness on the part of gallery people when you come in with a contract or when you say look, here is my contract that I use with my collectors on private sales. I would like these terms to be included in the gallery's sales contract.

They get very unhappy and uneasy. They say, why are you making such a fuss?

MS. DICKINSON: They call them Memos of Understanding when they feel better about contracts.

MR. CARLIN: Right.



MR. MAYER: My analogy of the labor-management model tends to break down to the extent that artists are not in a position to withhold their services for the economic leverage they might gain. For better or for worse, we have looked to government for representation in these areas.

We have, in addition to the Resale Royalties Act and the Art Preservation Act in this state, the Art and Public Buildings Program, the Artist-Dealer Relations Law, and the California Arts Council grant programs. Many of these focus on the concerns of early career artists, incidentally. We do look to government for a degree of representation that we can't effect otherwise.

Incidentally, I don't know if you've seen the film. One of the reasons that the Skull auction had such a dramatic effect, was because this auction was filmed. I don't know if you've seen this.

MR. PATRY: No, I haven't. That would be interesting.

MR. MAYER: Well, you might want to try to find a copy of it. If I recall correctly, at one point, one of the things that was remarkable was that Rauschenberg shoved Robert Skull. Bob Rauschenberg is almost your ultimate pacifist. He's one of the most gentle persons that one has ever seen. But when the sale took place -- and this was documented by the filmmaker -- Rauschenberg came up to Skull and said "Congratulations" -- shove -- "I work my tail off for fifteen years, and you make \$84,000."

Skull responded, saying, "Well, Bob, I've been working for you too. All of your prices are going to go up now."

MR. PATRY: That's the Larry Rivers article.

MR. MAYER: Exactly. With that, as I recall the film, Rauschenberg reached out and took Skull by the hand and said, come on, let's go to my studio

and you can buy a work that I've just finished, the same size as "Thaw." You can buy it for the same amount of money that you sold "Thaw" for. Of course, he backed off.

Incidentally, Rauschenberg commented to me once that there was a period when his works were in the resale market when he got interested in a conceptual art line that he was referring to as sort of art and science. These were not really commercially salable works, but they were certainly legitimate works under the rubric of visual art expression. He had to stop doing it because he had a family to support.

He said that if he'd been receiving royalties from the earlier works, he could have pursued that line. So, we don't know what's lost now because of that economic need that could be addressed by a resale royalty.

MR. PATRY: Thank you very much. Anyone else? Yes.

MS. ASAWA: Speaking for artists, when they get a commission, and they realize that work is going to cost twice as much as originally expected, they normally lose. For myself, I lost money making the Ghiradelli fountain, and I lost a huge amount making the Hyatt fountain. The resale has not paid me back what I lost.

I just wanted to let you know that. Because artists will spend everything in order to make the work right. Then when the Sieroty bill was passed, I had a commission, a very guaranteed commission. Then my contract -- I mean, I knew that I could be protected by the law because it was law -- I put the Sieroty five percent into my contract, and they backed out of a \$25,000 contract. I didn't have to do it because I already had the commission. When I made the agreement, they backed out.

MR. PATRY: Thank you very much.

Thank you very much for coming and sitting here freezing with the rest of us. I appreciate it very much.

What will happen is that we'll get a transcript. Then I will send you copies of it for you to edit and look at and correct and things like that.

Professor Goetzl, you wanted to make a brief summary here?

PROFESSOR GOETZL: If I may.

MR. PATRY: You may.

PROFESSOR GOETZL: Thank you.

MR. PATRY: Go ahead.

PROFESSOR GOETZL: It was an honor and a challenge to speak first. I appreciate the opportunity to speak again at the conclusion.

I wanted to add to my resume, that I am the chair-elect of the Association of American Law Schools, Art Law section.

MR. PATRY: Thank you.

PROFESSOR GOETZL: I also would like quickly to respond to a number of specific points, so there won't necessarily be any thread through this.

The characterization of this whole business as a labor-management dispute is interesting. I note that Richard Mayer has a background as a labor organizer, Jack Davis, the attorney from our board who represented the artists in Morseburg versus Balyon, is a labor lawyer. It's perhaps not coincidental that that's the case. As I stated earlier, the goal of artists in this legislation is to achieve parity with other authors, Where artists have been treated differently, it is perhaps primarily because artists, unlike other authors, have never been organized. Because their work product is especially unique, it is not fungible.

Moreover, it is unlikely that they will ever be organized. Aside from the appellation, there's very little parallel between Artists Equity and Actors Equity. The former is an association of visual artists working toward some common goals; the latter is a working union. It's never going to be any different.

That's why many of us, as advocates, have chosen to work on behalf of artists. Fortunately, Eleanor Dickinson's characterization of protective legislation as dealing with idiots and children is not entirely apt. We also have a lot of protective legislation for other groups which, due to their lesser bargaining power, are unable to protect themselves. For example, legislation frequently establishes non-waivable rights for tenants and consumers.

MR. PATRY: Well, there are also provisions in the Copyright Act.

PROFESSOR GOETZL: Absolutely.

MR. PATRY: We terminate transfers after 35 years.

PROFESSOR GOETZL: Absolutely, so that authors can get a second shot at it.

MR. PATRY: Yes.

PROFESSOR GOETZL: With respect to the blackballing -- I'll try to go through these things rather quickly. I think the blackballing will become less and less of an issue as paying the resale royalty becomes established as normative behavior. That is what is expected. This process should proceed more quickly if an intermediary is used. If we have an "ASCAP" or "BMI" type of organization, that would defuse some of that problem.

With respect to the point that Mr. Davis and Ms. Robinson raised about alternative dispute resolution, I concur it would be a good idea because it's hard to see the federal courts wanting to entertain a great number of

additional lawsuits. I think they're clearly overburdened as it is. We should, however, keep the availability of attorney's fees.

But most importantly, I wanted to address a number of points that Professor Merryman raised. It is with relevance to his remarks that, perhaps, you can better appreciate my quote about my desire that artists not be the only socialists in a capitalist society. Unfortunately, the people who oppose this legislation persist in characterizing it as welfare legislation.

Professor Merryman, again, says that he would prefer and would be willing to endure a resale royalty where the funds, more modest than what we would like to see, would go into a fund to improve the status of all artists. I think I can fairly represent on behalf of most of the working artists I've been in contact with, that that is insulting and it is patronizing.

No one has ever suggested that inventors should remit some of their patent royalties to benefit unsuccessful inventors or that the royalties should be seized from writers and composers, playwrights, and choreographers, and used to benefit emerging authors. Why should visual artists be asked to do this?

Artists need help in advancing their careers, but that is not what the copyright law is about. As you referred earlier to the constitutional grant of authority in Article I, Section 8, Clause 8, it's clear that that's not what this is about. This is to advance the arts by providing limited monopolies.

The experience in France, Germany, and Belgium, which he neglected to speak of, is really not very relevant. What is important is that the United States be internally consistent and that we lead the way in treating people fairly.

I'm sad to see that we, only belatedly, joined the Berne Convention, a century after most countries had joined it, and then only because we were



beginning to lose some important market advantages, particularly with computer software abroad. We should be leading the way. We should be the model for other countries.

With respect to the resale royalty causing a weakening in the U.S. market for art, again, I think this is a misunderstanding. Yes, art is mobile. So is money. But the buyers are not mobile.

People will resell a work of art in California today at auction at Butterfield and Butterfield, which is doing a very considerable business in the resale of contemporary art, rather than New York, in spite of our having a royalty and New York not having it, simply because they believe that the best market for that art is in California. Wise sellers will prefer to receive 95 percent of a larger price than 100 percent of a smaller price. If Bolivia were the only country in the world that didn't have a resale royalty, I hardly think that the art market would flock to Bolivia.

In any case, and what I find troubling is the implication of that kind of an argument. No doubt our competitive position in the world would be greatly improved if we would eliminate minimum wages, or if we would remove our child welfare laws. Yet, we adhere to those things because we try to do what is right. Even if there is some adverse impact in the world market, accept it. But there wouldn't be such in the case of art so long as the buyers are here.

In summary, what I would like to offer is that since the copyright law was first enacted in this country more than 200 years ago, a lot of changes have occurred. Of relevance is that we have much improved technology. Our ability to keep track of when a work is being sold and bought has been greatly improved. The opportunity for monitoring sales through an "ASCAP" or "BMI" type organization is present where once it would have been impossible.

There are other pressures at work that haven't been referred to that suggest that one of these days we will have some kind of a national registry of art works. I think some of these pressures are going to come from the insurance industry, which is dealing with growing problems of art theft, the difficulty in tracing the provenance of works of art, and the frauds and forgeries which can occur. All of this will be greatly reduced if we have figured out a way to "fingerprint," to stamp art.

There are ways being developed now to do this and track it with computer registries. In fact, as you're probably aware, this is being done on a private basis in a number of places. In due course, all of that will make it more feasible to have such a resale royalty.

In conclusion, I would like to remind you because I know that you know this, that the kinds of arguments which are being raised against the resale royalty today ring very familiar to the kinds of arguments that were raised in opposition to the public performance right which was enacted in 1909.

Then, it was argued, why should people who have copyrighted music or lyrics receive a royalty when their work is performed at a hotel dance floor. After all, when more people listen to it, they'll just go out and buy more sheet music and the authors can make their money then.

When the radio industry was in its infancy, the issue arose of composers and lyricists claiming a royalty for air play. Again, it was argued that if you're going to charge us a royalty for airplay, we won't play your music. We'll play public domain music.

Well, that was responded to by the market place. Not everyone wanted to listen to public domain, classical music. Many others wanted to listen to

contemporary music. The same will occur in the art area. In addition to classical or impressionist art, art lovers also wish to view contemporary art.

Happily, the royalty it prevailed in the music industry. All of this was confirmed to me in a conversation I had some years ago when Herman Finklestein, long-time general counsel for A.S.C.A.P., was a guest of in one of my classes. He said, there is a parallel between the history of A.S.C.A.P. and what you are trying to do for the visual arts.

Congress concluded, and it has borne fruit for everyone, that the authors -- in that case, the composer and the lyricist -- should be compensated for the performances of their work. The fact that they benefit on a continuing basis and may also profit in other ways, is simply not relevant.

I urge that favorable consideration be given to some kind of resale royalty rights for visual artists, and that a recommendation to that effect be incorporated in your report to the Congress. I thank you very much.

MR. PATRY: Thank you very much. Thank everyone for coming. Anyone can submit written comments -- you're certainly welcome to submit anything that you want in writing. Thank you.

[Whereupon, the hearing was adjourned at 12:25 o'clock p.m.]

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**PART III - Transcript of New York Hearing**

**Witnesses for New York Hearing  
on Resale Royalties**

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2 UNITED STATES OF AMERICA

3 COPYRIGHT OFFICE

4 - - - - -x

5 In the Matter of:

6 ARTISTS' RESALE ROYALTIES

7 - - - - -x

8 March 6, 1992

9 40 Centre Street

10 New York, New York

11 9:30 a.m.

12

13 B e f o r e:

14

15 RALPH OMAN,

16 Register of Copyrights

17 and

18 WILLIAM PATRY,

19 Policy Planning Advisor to the

20 Register

21

22 NEWROCK/DeSIMONE-THE COURT REPORTERS

23 21 West 38th Street

24 New York, New York 10018

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1

2                    MR. OMAN: Good morning and  
3 welcome.

4                    I am Ralph Oman, the Register of  
5 Copyrights in the United States.

6                    I am accompanied by one of my Policy  
7 Planning Advisors, Mr. William Patry.

8                    As all of you know, today's hearing  
9 is on the subject of artists'  
10 resale royalty rights.

11                   We will hear from a  
12 distinguished group of witnesses from the  
13 United States and Europe.

14                   I thank each of the witnesses  
15 for appearing today and for helping us  
16 reach the right result.

17                   This is the second hearing held  
18 by the Copyright Office in preparation for  
19 a report we are required to submit to  
20 Congress this year.

21                   Our first hearing held in  
22 San Francisco on January 23rd  
23 was chaired by Mr. Patry. That hearing  
24 provided us with valuable information  
25 about the California experience with the

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2 Artists' Resale Royalty Law.

3

4 Today's hearing will provide us  
5 with information about how droit de suite,  
6 to use the French term, is working in  
7 Europe, especially in the country of its  
8 birth, France. We will also hear from  
9 American witnesses arguing both for and  
10 against the adoption of droit de suite in  
the United States.

11

12 Due to the large number of  
13 witnesses, I hope to be able to run what  
14 we call a tight ship so that each of the  
15 witnesses is not cut short or slighted,  
16 and so that we can conclude the hearing in  
17 a timely fashion today. For this reason,  
18 I regret that I cannot invite members of  
19 the audience to make statements or ask  
20 questions. Of course, everyone is free to  
21 submit comments in writing; I  
22 encourage you to do so, and I also assure  
23 you that they will be fully considered.

24

25 We hope to take a lunch break  
today from 1:00 o'clock to 2:00 o'clock,  
and wind up the hearing by 4:00 or 4:30

1  
2 this afternoon.

3 We will begin with a panel of  
4 distinguished witnesses from France and Sweden.

5 Monsieur Jean-Marc Gutton and  
6 Madame Christiane Ramonbordes represent  
7 the Société des Auteurs dans les Arts  
8 Graphiques et Plastiques, an association  
9 that administers artists' rights,  
10 including the droit de suite.

11 Monsieur Stefan Andersson  
12 represents the Federation Internationale  
13 des Diffuseurs D'Art Originales, an  
14 association of art gallery owners from ten  
15 European countries.

16 I wish to thank all three of you  
17 for making the trip across the Atlantic  
18 Ocean and for appearing before us today,  
19 and also for your kindness in meeting with  
20 Mr. Patry this summer.

21 I note that the birthplace of  
22 the droit de suite is the birthplace of  
23 many famous artists, and the French  
24 experience can provide us with many  
25 valuable lessons.

1

2                   It is a great privilege to have  
3   you here today.

4                   Monsieur Gutton, if you could  
5   begin I would be grateful.

6                   MR. GUTTON: Thank you, Mr.  
7   Chairman.

8                   First of all, I want to thank  
9   Mr. Patry for the invitation, and the  
10   Copyright Office, to be so involved  
11   regarding droit de suite, regarding this  
12   matter, and the integral right.

13                   I want to apologize for my  
14   English, you will see it's not the best.  
15   I will try to do my best in your language,  
16   and I hope you will not tell me at the end  
17   of my report that it would have been  
18   really better if I had spoken in French.

19                   My intention is not to speak in  
20   general about droit de suite, but to be  
21   particular and complete.

22                   As an introduction, I want to  
23   outline four points.

24                   First, we must never forget that  
25   without artists there would, obviously, be



1

2 no art market.

3

4 Second, droit de  
5 suite has a legal existence in 29 nations,  
6 throughout the world, in which 14  
7 are European.

8

9 Third, since 1920, the  
10 birth of droit de suite in France, the  
11 ground covered by droit de suite will be  
12 the best testimony of its validity and  
13 equity.

14

15 Fourth, droit de suite, in my  
16 experience, runs not only well, but very  
17 well when you have simple concepts and  
18 simple regulations, and to the best  
19 satisfaction of artists.

20

21 It's naturally quite  
22 unbelievable for people who don't know  
23 anything about application of droit de  
24 suite to imagine it. The lack of  
25 information in a country such as yours, a great  
country, is the main weakness regarding  
that right. That is the reason I am here  
and have prepared a study. And Mr. Patry  
has a sample of it.

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If anybody needs to have one, it's absolutely possible to get it. Anyway, if I have not enough, I will be able to send it to anybody if I have the address.

Regarding the content of my study, in summary, the first part is a response to criticism against droit de suite and the second part concerns administration of droit de suite in France.

First response to the criticism.

It is only natural that droit de suite should be unacceptable for countries with a tradition of Anglo-Saxon law under which copyright is considered as a pecuniary right, and a work of art becomes a commercial product over which the artist detains no rights.

It's natural that droit de suite should be violently opposed by a certain number, particularly commercial companies, since it comes into direct conflict with

1  
2 their interests.

3 This criticism was expressed  
4 notably by several official personalities  
5 involved in art.

6 Last July, I sent in my reply as  
7 a testimony regarding the position of Mr.  
8 Ainslie, President and Chief Executive  
9 Officer of Sotheby's Holdings, Inc., and  
10 Mr. Patry has it.

11 Similar criticism was taken up  
12 recently by Ralph Lerner, Esq. in his  
13 Report of the United States for the Fourth  
14 Symposium on legal aspects of  
15 international trade in art (ICC - Madrid,  
16 a few weeks ago, it was a meeting, a  
17 symposium, between the 12th and the 14th  
18 of February), in the following terms: "In  
19 my opinion, droit de suite is not  
20 particularly important for artists and  
21 tends only to be a benefit to artists who  
22 are extremely successful and may not need  
23 the additional income and protection. In  
24 my opinion it inhibits the trade in art,  
25 and would be a benefit to few artists,

1  
2 difficult to enforce and costly to  
3 regulate."

4               That was the position of Mr.  
5 Ralph Lerner. And the ICC has received a  
6 report from him.

7               I will be pleased to reply  
8 regarding, first, the failure of the  
9 Californian precedent; second, the effect  
10 of droit de suite on the art market;  
11 third, costs involved in the  
12 administration of this right; and,  
13 finally, the beneficiaries of droit de  
14 suite (number of beneficiaries and  
15 inequality of benefits).

16              The Californian precedent.

17              Although its underlying  
18 principle and some of its articles are  
19 sound, the California law of 1976 is  
20 nevertheless inapplicable as it stands.  
21 An isolated case, ignored by all parties  
22 concerned, and far too complicated to  
23 apply, it thus cannot be used as  
24 reference. That is our opinion.

25              Isolated. Because the

1

2 Californian law is an isolated case, the  
3 possibility of applying it arouses little  
4 interest among artists. Furthermore, its  
5 application gives rise to many  
6 difficulties for the artist concerned and  
7 upsets the balance of fair trading  
8 vis-a-vis the other states.

9           Complicated. The requirements  
10 of the law are far too exacting and  
11 complicated to encourage an efficient  
12 application of droit de suite. These  
13 requirements include, as everybody knows,  
14 the obligatory residence of the vendor,  
15 obligatory citizenship of the artist,  
16 complex limitations restricting the works  
17 concerned by droit de suite.

18           Consequently, application of  
19 this law in California is impossible on both  
20 the individual and the collective  
21 levels. An authors' society could not  
22 effectively administer this right within  
23 the existing legal framework.

24           We suggest that you refer on  
25 this subject to the survey by Mr. Peter H.

1  
2 Karlen (Cf. U.S. National Report on Rights  
3 of Artists and the Circulation of Works of  
4 Art, 1991) carried out for the ICC -  
5 Madrid 1992 on the subject of the  
6 "Californian Statute and its Effects."

7 Mr. Karlen practices art,  
8 publishing, and intellectual property law  
9 in La Jolla, California.

10 The second point is regarding  
11 the effect of droit de suite on the art  
12 market.

13 The fluctuations in the art  
14 market over the past ten years are  
15 particularly significant on this point.  
16 They prove that, far from ruining the  
17 market in the countries where droit de  
18 suite is applied, it brings those countries a level  
19 of stability for which they are envied by  
20 countries where the right is not applied,  
21 and which have been attracted by the false  
22 market of financial speculation.

23 It should be pointed out that  
24 from 1980 to 1990 the progression of  
25 modern art sales in France vied



1  
2 successfully with progression in the  
3 United States of America.

4 In the United States sales were  
5 multiplied by 17 in eight years, between  
6 1980 and 1987. It seems probable however  
7 that these figures include sales of  
8 Impressionist Art.

9 In France, sales of purely  
10 contemporary art (artists in copyright)  
11 were multiplied by ten in eight years,  
12 1980 to 1987, and by 41 in eleven years,  
13 1980 to 1990.

14 In 1991, the year when the world  
15 market collapsed, the annual figures of  
16 auction sales as compared with 1990 show a  
17 drop of almost 55 percent for Sotheby's,  
18 49 percent for Christies, and only 37  
19 percent for Drouot (France).

20 The Parisian market suffered  
21 less because it was fortunately less  
22 concerned by the sale of works of  
23 extremely high value entailing  
24 speculation.

25 Thus, serious analysis suffices

1

2 to prove that droit de suite does not  
3 depress the market.

4 Droit de suite should not be  
5 considered as a capital gains tax, but as  
6 an artist's right which it is normal for  
7 them to receive.

8 Competition between countries  
9 should not depend upon selective criteria  
10 applied to the disadvantage of certain  
11 artists, but upon such criteria as:  
12 facilities afford by the geographical  
13 location; wealth and demography of a given  
14 country; importance of a country's  
15 creative and cultural activity; advantages  
16 resulting from national taxation; and so  
17 on.

18 Furthermore, all serious surveys  
19 have shown that there is no greater  
20 tendency towards underground business  
21 activities in countries where droit de  
22 suite is applied than elsewhere.

23 The third point concerns the  
24 administrative expense of droit de suite.

25 In the interest of both the

1  
2 artist and the vendor, droit de suite  
3 should be administered collectively. The  
4 utility and efficiency of such a form of  
5 administration is underlined by WIPO  
6 (Cf. "Collective Administration of  
7 Author's Rights and Related Rights").

8               The administration of droit de  
9 suite in all countries where it is applied  
10 is only a light burden to both authors'  
11 societies and auctioneers or vendors  
12 entailing low management expenses. For  
13 instance, in France, for \$20 collected  
14 more than 16 are distributed.

15              Each payment of the right made  
16 to an artist is accompanied by a complete  
17 and detailed statement of all transactions  
18 concerned. These statements contain as  
19 much information about works which remain  
20 unsold at auctions as those which are  
21 sold, and this allows the artists to  
22 remain perfectly well informed about the  
23 destiny of his artworks on the art  
24 market.

25              Further, the generalization of

1  
2 droit de suite using simple rules of  
3 application should automatically decrease  
4 the administrative costs.

5           It must be underlined that only  
6 an artists' rights society is in a  
7 position to manage droit de suite in a  
8 satisfactory manner. Headed by a board  
9 composed of artists and heirs, such a  
10 society, open at all times to examination,  
11 can ensure that the administration of  
12 droit de suite and the paying out of  
13 amounts collected remain fully reliable.

14           Furthermore, only an artists'  
15 rights society can successfully defend the  
16 rights of the artist on both the national  
17 and international levels.

18           First point, beneficiaries of  
19 droit de suite.

20           Droit de suite does not benefit  
21 only successful or established artists and  
22 heirs.

23           In 1990 ADAGP collected resale  
24 royalties for 1,650 of its 2,500 direct  
25 members, (85 percent of whom are living

1  
2 artists) (for a total amount of more than  
3 \$10.5 million) in the following proportions:  
4 1100 members received an amount between  
5 \$20 to \$2,000; 400 members received \$2,000  
6 to \$20,000; 100 members received \$20,000  
7 to \$40,000; and 50 members received more  
8 than \$40,000.

9           Following the decrease in the  
10 market at the end of 1990 and in 1991  
11 ADAGP distributed \$7 million to its  
12 members in 1991.

13           For its part, SPADEM, the other  
14 French artists' society involving visual  
15 art, collected \$7 million in 1990 and \$4  
16 million in 1991.

17           The rating of an artist in any  
18 country is subject to upward or downward  
19 fluctuations. The real issue is: Do  
20 purchasers buy a work of art for the sake  
21 of that work, or rather in order to resell  
22 it for profit as soon as possible?

23           Thus, if droit de suite were  
24 generalized in the United States, which is  
25 an important center of creativity, it is

1  
2 not excessive guesswork to state that  
3 thousands of artists would stand to  
4 benefit from droit de suite.

5           It is time to correct the false  
6 idea that only the rich will benefit from  
7 droit de suite. Even if this were  
8 true in certain exceptional circumstances,  
9 since when has the United States of  
10 America, as a capitalist country promoting  
11 free enterprise, decided to limit fortune  
12 making to merchants only and to exclude  
13 artists from reaping the benefits due to  
14 the creative elite?

15           At the beginning of January  
16 1992, one of the French television  
17 channels broadcast a documentary program  
18 on what has become of the heirs of Renoir,  
19 Cezanne, Monet, and so on. The facts are  
20 simple. Far from owning artworks or a  
21 fortune derived from the works of their  
22 grandfathers, they are modestly devoted to  
23 the promulgation of those works.

24           Philippe Cezanne, for instance,  
25 grandson of Paul, who owns one picture



1  
2 only, earns his living as an art expert.

3 Claude Renoir, grandson of  
4 Auguste, owns three pictures and acts as  
5 guardian to the "temple."

6 Jean-Marie Toulgouat, a  
7 descendant of Claude Monet, struggles to  
8 keep alive the cult of his grandfather.

9 Furthermore, we are not lacking  
10 in examples of living artists or heirs who  
11 spend money from droit de suite to help  
12 compile catalogues raisonnées, (an  
13 extremely costly undertaking), to open  
14 foundations to perpetuate the memory of  
15 the artist, to organize exhibitions, or in  
16 certain cases simply to meet their most  
17 basic needs.

18 In conclusion, regarding these  
19 criticisms: It's established that  
20 traditional criticism of droit de suite is  
21 unfounded.

22 It is established that, in the  
23 countries where the right exists, its  
24 effective and efficient application  
25 depends very much upon the following

1  
2 simple criteria:

3           The first of them is  
4 indefeasibility of droit de suite.

5           Second. Beneficiaries of droit  
6 de suite should be artists and their  
7 heirs.

8           Third. Application of droit de  
9 suite should be limited to original works  
10 for all resales.

11           Fourth. Calculation of droit de  
12 suite on the total resale price (droit de  
13 suite based on capital gains is  
14 inapplicable and dissuasive).

15           Fifth. Application of a fixed  
16 rate (a degressive rate goes against the  
17 philosophy of droit de suite).

18           And, sixth. Obligatory  
19 collective administration of droit de  
20 suite through an artists' rights society.

21           Furthermore, far from depressing  
22 the art market, the application of droit  
23 de suite to all creators reflects  
24 positively upon that market as an  
25 equitable measure which establishes it on

1  
2 a basis of fair competition for all  
3 talent.

4           It would be to the honor of all  
5 countries involved in the art market to  
6 accept the same philosophy and reasoning  
7 for all intellectual creators which, at  
8 the same time, would afford an excellent  
9 opportunity to work towards the  
10 establishment of good relations on the  
11 intellectual level rather than being  
12 governed by the overwhelming obsession of  
13 making a profit.

14           The final remark, an optimistic  
15 one. In order to avoid any disparity  
16 between artists, droit de suite would  
17 necessarily have to be applied  
18 retroactively to living artists, and those  
19 who died less than 50 years ago, without  
20 taking into account the status of the  
21 individual works.

22           This would permit American  
23 artists to benefit from droit de suite in  
24 countries of the European Community where  
25 the condition of reciprocity is applied.

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2 I want to add, if it is  
3 possible, a few remarks about the  
4 administration of droit de suite.

5 First, information concerning  
6 auction sales. In conformity with an  
7 agreement, French auction houses send  
8 ADAGP the sale catalogs and full  
9 information before each auction sale.  
10 After we receive it we put the information  
11 into the computer about all the works  
12 going on sale for the auction. Before the  
13 sale ADAGP sends the auction house a  
14 detailed statement of those works giving  
15 full reference of the name of the artist,  
16 naturally, the title of the work, size,  
17 techniques, and so on. After the sale the  
18 auction house sends the statement back to  
19 ADAGP with the sale price, the amount of  
20 droit de suite, and so on.

21 There are annexed to my report  
22 two forms, the form we send to the  
23 auctioneer and the form we receive back  
24 from the auctioneer.

25 For the payment to members, upon

1  
2 receipt of the statement from the auction  
3 house, they enter the information into the  
4 computer, and the amount of droit de suite  
5 is immediately credited to the member's  
6 account.

7           After resolution of its  
8 administrative commission and costs ADAGP  
9 then makes payment to members. Payment is  
10 accompanied by a statement giving full  
11 information about the work involved, name  
12 of the auction house, place of the sale,  
13 sale price, amount of droit de suite, and  
14 so on.

15           Mr. Patry asked me to inform the  
16 Court about the benefit of artists, and I  
17 did that in the other part of my report.  
18 I have nothing to add on that point, but  
19 if there are any questions I will reply.

20           Thank you, gentlemen.

21           MR. OMAN: Thank you very much,  
22 Monsieur Gutton.

23           Before asking specific  
24 questions, I will ask Mr. Andersson to  
25 make his presentation at this point.

1

2

Mr. Andersson.

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MR. ANDERSSON: Thank you, your  
Honor.

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6

I am very honored to be invited  
here today.

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I would like to make a short  
presentation about myself. I come from  
Sweden. I am the President of the Swedish  
Galleries Association, and it is because  
of that I come today.

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The Swedish Galleries  
Association is a member of the FIDAOA  
(Federation Internationale des Diffuseurs  
d'oeuvre d'art Originales) which is an  
organization, as Mr. Patry told us, for ten  
European countries. And altogether we organize  
about 2,000 art galleries in Europe. The countries  
are Germany, France, Italy, Spain, Great Britain,  
Denmark, Belgium, Holland, Greece, and Sweden.

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Beside my situation as President  
of the Swedish Galleries Association, I  
also run an art gallery in a small town  
called Umea, it's situated 700 kilometers  
north of Stockholm. It's about 64 degrees



1  
2 north. And you have to travel about 250  
3 miles north from Anchorage, Alaska to come  
4 to the same level.

5 MR. OMAN: There's a booming art  
6 market up there, I imagine.

7 MR. ANDERSSON: Yes, there is.  
8 You have heard Mr. Gutton from  
9 France explain the argument for the  
10 FIDOA before, he is the President of the  
11 French Gallery Association. And I think I  
12 might have some new arguments because  
13 Sweden does not have a system with a  
14 copyright for visual artists. And it is,  
15 for me, very difficult to understand why  
16 you should have it. The whole idea of  
17 advocating copyright or droit de suite on  
18 visual artists is illogical and very  
19 difficult to understand.

20 We have heard arguments where  
21 artists are comparing their situation with  
22 authors. I would say that this comparison  
23 is not possible to make. Paintings and  
24 books are not sold in equal ways. A  
25 painting is unique and is sold in one

1  
2 piece to one customer. A book -- and by  
3 "a book" I mean the work that the author  
4 has put into it -- a book is sold in  
5 pieces, in thousands of copies, to a large  
6 group of customers. You don't know the  
7 total price of the book until you have  
8 sold the last copy of it. As long as  
9 the book is selling, the author,  
10 naturally, should have his share because  
11 even if the publisher prints new editions,  
12 people are still asking for the  
13 book. Each sale is still the first time a  
14 particular copy of the book is sold.

15           It is a matter of security for  
16 the author. There must be legal  
17 regulations because the author has little  
18 control over what is happening with his  
19 manuscript unless he is his own publisher.  
20 And that also goes with the meaning of the word  
21 copyright, it is the right to the copies.

22           The artist doesn't have that  
23 problem. Paintings are unique and are not  
24 sold in thousands of copies, the artist  
25 knows where the painting is, probably at

1  
2 his gallery, and he can control when it is  
3 sold, and he can control that he gets his  
4 money.

5               What you are talking about is  
6 getting money from the second market, the  
7 second time the piece is sold. No  
8 author gets anything from books that are  
9 sold in secondhand book shops or a book  
10 auctions. That is the big difference. I  
11 mean, we are talking about putting a fee  
12 on paintings that are sold the second time  
13 and comparing it with the situation of  
14 authors.

15               If visual artists would sell  
16 prints, lithographs, et cetera, in  
17 unlimited editions then we would have a  
18 situation that would be comparable with  
19 authors; but it is not likely that this  
20 will happen because people don't want to  
21 buy art that way.

22               Authors don't get anything from  
23 the secondhand market like auctions, and  
24 neither should visual artists because if  
25 we let them have this what shall we do,

1  
2 for example, with architects, should they  
3 get a percentage when you sell real  
4 estate?

5 I think that comparison is much  
6 better than the comparison between authors  
7 and visual artists.

8 I can understand the frustration  
9 artists might have felt during the 1980's  
10 when people could earn money just by  
11 owning a painting or real estate for a  
12 short while and then selling it with a  
13 large profit; but it is still illogical to  
14 try to get a piece of that profit because  
15 if you do that you must also take a share  
16 of the losses. Today people are  
17 losing money on their so-called art  
18 investments that they made during  
19 the 1980's.

20 Will artists go into those  
21 losses and share them with those who lost  
22 money?

23 I don't think so.

24 And in the long run, and in  
25 total, I don't believe that art is such a

1  
2 good investment. If the value increases,  
3 I would say that most of it is inflation.

4 I would also say that most artworks  
5 cannot be sold with profit. Therefore,  
6 it is even harder to understand why  
7 there should be a copyright or selling  
8 fee, it feels like it is a punishment for  
9 not keeping the painting or the artwork.

10 In countries where droit de  
11 suite exists we have learned that it does  
12 not reach its goal. Experience shows that  
13 only artists who have a good notoriety  
14 take advantage of these rights. For  
15 other artists, when the amount doesn't  
16 reach a certain level, it is kept by  
17 the registration society for its  
18 registration fees.

19 So, we strongly recommend against  
20 installing a system like this, it will only  
21 feed bureaucrats and those who really need  
22 financial support will not have it.

23 We have heard Mr. Gutton explain  
24 how the situation has been on artists like  
25 Matisse, Cezanne, and Monet, and I cannot

1

2 think that this is an important matter to  
3 support those kinds of artists or their  
4 relatives.

5

So, as a conclusion, the FIDOAO  
6 is strongly against droit de suite or  
7 copyright for visual artists, and we hope  
8 that you do not install it. We also  
9 hope that countries that already have it  
10 installed try to reconsider again if the  
11 system is right or wrong.

12

Of course, when you have had a  
13 system for 33 years, as they have had in  
14 France, you make it work and it will, of  
15 course, function; but maybe you don't  
16 think about other ways whether the system  
17 is right or wrong. But we have seen  
18 larger political systems being  
19 reconsidered during the last years, and I  
20 think this is the time to reconsider this  
21 one as well.

22

Thank you.

23

MR. OMAN: Thank you very much,

24

Mr. Andersson.

25

Let me start with a few



1  
2 questions for Monsieur Gutton.

3 I don't understand exactly how  
4 your system works. And my question is,  
5 does your society acquire exclusive rights  
6 from the artists it represents or can the  
7 artists still license their rights  
8 directly, even though they are members of  
9 your association?

10 MR. GUTTON: Well, the society  
11 is not an association. We are a society,  
12 a civil society. When artists ask to be  
13 a member of the society, they keep their  
14 freedom, and they can continue to manage  
15 their right. But for droit de suite, for  
16 instance, and especially when we know the  
17 situation in France, it cannot  
18 manage its own droit de suite alone. Why?  
19 As you may know, there are  
20 more than 400 auctioneers in France. If  
21 an artist stays alone, no auctioneer will  
22 give him information permitting him to  
23 afford the situation. It is only  
24 through an author's society that rights can  
25 be managed.

315

1

2                   MR. OMAN: I think that  
3 clarifies the point.

4                   How do you actually divide the  
5 money between surviving heirs?

6                   And suppose there are several  
7 former husbands or wives, how is that  
8 managed?

9                   MR. GUTTON: Well, it's very  
10 clear when the artist is alive. When the  
11 artist dies we have, certainly, all the  
12 information regarding the part of each  
13 heir. And sometimes when the situation is  
14 quite large, maybe sometime we have fifteen  
15 heirs, and we apply accurately the part  
16 for each person involved.

17                   MR. OMAN: The wife who was the  
18 wife at the time of the creation of the  
19 painting doesn't get a larger share  
20 because she inspired the painting?

21                   MR. GUTTON: There are  
22 sometimes difficulties; but, in fact, I  
23 can say with my experience and 2,500  
24 members, it's absolutely marginal. It's  
25 normal in a way that the widow receives a

1  
2 part, and it's absolutely normal for the  
3 son, and so on.

4 MR. OMAN: Does droit de suite  
5 in France encourage artists to produce  
6 more art by allowing them to earn money to  
7 feed their families and pay the rent or  
8 does it just benefit the heirs in most  
9 cases who really don't produce art?

10 MR. GUTTON: No, we cannot say  
11 that droit de suite encourages the artists  
12 to produce more. They don't care. An  
13 artist is a free man, and maybe more free  
14 than anybody else. He's fully  
15 involved in his work, and he does not care if  
16 he needs one year for one work or if he's  
17 able to create several works per day.

18 MR. OMAN: But if he has to take  
19 a job at the bank to earn money to buy  
20 food, he wouldn't be able to spend his time  
21 producing art, or she wouldn't be able to  
22 spend her time producing art.

23 Has that had a direct impact on  
24 the prosperity of artists in France?

25 MR. GUTTON: Yes, certainly,

1

2 because it is a basic revenue for men.

3 The droit de suite that is distributed is

4 to 85 percent of our members who are live

5 artists, and the heirs is only 15

6 percent. So, the main part of the droit7 de suite is for live artists.

8 And I can add that when we send

9 them the droit de suite it's not only a

10 check, it's full information regarding

11 what is happening with their work, and

12 when it was sold, if it is not sold, and

13 so on. We know all our members are very

14 concerned and wish to have that

15 information.

16 MR. OMAN: Do you find artists

17 today are more concerned about money and

18 pensions in their old age than artists

19 were 100 years ago?

20 (Discussion held off the

21 record.)

22 MR. GUTTON: Well, I can reply,

23 it's exactly the same between this

24 generation and past generations. In the

25 beginning of the century the situation

1  
2 was, as everybody knows, very difficult,  
3 and now we are in a -- I do not know the  
4 translation -- and, so, artists turn to  
5 droit de suite money. When you  
6 receive money, it's testimony that you are  
7 not alone with your work, that your work  
8 really is well-known, and you have a  
9 position, and so on.

10 MR. OMAN: I have one final  
11 question. I wonder if you think that  
12 droit de suite in France encourages  
13 artists to sell their paintings for a  
14 lower price for the first sale knowing  
15 that they will benefit if the work  
16 increases in value, or do they still hold  
17 out for a high price at the front end?

18 MR. GUTTON: Well, as you  
19 imagine, I asked many persons involved in  
20 the art market what was the good impact  
21 and consequences of droit de suite and the  
22 bad ones. I never heard anything in that  
23 way regarding the market or an artists'  
24 attitude. Never. So, I don't think in  
25 France or in countries where they employ

1  
2 droit de suite it's different than in  
3 another place. It is the same for it.

4 MR. OMAN: Thank you.

5 I'll save my questions for Mr.  
6 Andersson for just a moment and turn the  
7 microphone over to Mr. Patry.

8 MR. PATRY: I will ask questions  
9 of Mr. Gutton and then Mr. Oman can ask  
10 questions of Mr. Andersson.

11 Monsieur Gutton, just to clarify  
12 how droit de suite works in France, what  
13 we are talking about here is a percent of  
14 the sale price of a work of art; correct?

15 MR. GUTTON: Yes.

16 MR. PATRY: When a work of art  
17 is sold in France a certain percent of  
18 that sale price is paid by the seller to  
19 the artist?

20 MR. GUTTON: Yes.

21 MR. PATRY: And that percent is  
22 three percent; correct?

23 MR. GUTTON: Yes.

24 MR. PATRY: And that percent is  
25 paid regardless of whether the painting



1  
2 sold at a lower price than it originally  
3 sold for. So, the dealer, let's say,  
4 bought the work for 1,000 francs from the  
5 artist, and then resells it for 750  
6 francs, but the three percent royalty is  
7 still paid; is that correct?

8 MR. GUTTON: Yes.

9 MR. PATRY: Yes.

10 It's not a percent of the  
11 profit, it's simply a percent of any  
12 resale of the work?

13 MR. GUTTON: That's right. Yes.

14 MR. PATRY: Now, when France  
15 originally enacted droit de suite it was  
16 on auctions only; is that correct?

17 MR. GUTTON: Absolutely correct.

18 MR. PATRY: That was 1920.

19 Then in 1957 --

20 MR. GUTTON: No, in 1920 it  
21 was droit de suite for all public  
22 auctions.

23 MR. PATRY: But in 1957 there  
24 was a change.

25 MR. GUTTON: Which time?

1

2           MR. PATRY: In 1957 there was a  
3 change.

4           MR. GUTTON: No, no. In 1957 it  
5 was for the whole market.

6           MR. PATRY: All right.

7           MR. GUTTON: We didn't apply it  
8 to galleries for reasons of social  
9 security.

10           MR. PATRY: So, as the law is  
11 written now, droit de suite applies both  
12 to sales through auctions and to sales  
13 through galleries, at least the law is  
14 written that way; correct?

15           MR. GUTTON: Can you repeat  
16 that, please?

17           MR. PATRY: Yes.

18           The law as it is written, if you  
19 go to the French legal books, the  
20 droit de suite law says that the payment  
21 will be made on sales at auctions and on  
22 sales through galleries; correct?

23           MR. GUTTON: Yes.

24           MR. PATRY: The law is written  
25 that way?

1

2                   MR. GUTTON: That's correct.

3     Yes.

4                   MR. PATRY:

5                   And it lasts for the life  
6     of the author plus fifty years, I believe;  
7     is that correct?

8                   So the sale is triggered not only  
9     when the artist is alive, but payments  
10    are made for sales fifty years after  
11    the author dies?

12                   MR. GUTTON: That's right. Yes.13                   MR. PATRY:

14                   And it applies not just to  
15    paintings, but it applies to other forms  
16    of art like tapestry?

17                   MR. GUTTON: Absolutely.18                   MR. PATRY: Furniture?

19                   MR. GUTTON: Well, furniture,  
20    but only if it is an original work and not  
21    a series.

22                   MR. PATRY: Basically, what the  
23    art market considers art.

24                   If Picasso created a ceramic jug  
25    and it was an original, of course droit de

1  
2 suite would be paid on that?

3 MR. GUTTON: Yes.

4 MR. PATRY: If Picasso  
5 created a really good looking chair and it  
6 was sold at an auction, would a droit de  
7 suite be paid on that?

8 MR. GUTTON: Can you repeat  
9 that, please?

10 (Discussion held off the  
11 record.)

12 MR. GUTTON: Yes, if it is an  
13 original work. Yes.

14 MR. PATRY: Now, we just  
15 mentioned --

16 MR. GUTTON: Only one piece --  
17 you know.

18 MR. PATRY: Only one piece?

19 MR. GUTTON: Yes, that is very  
20 important.

21 MR. PATRY: Yes.

22 Now, we just went over that the  
23 law as written applies to  
24 sales that are made through  
25 galleries, however, that is not enforced;

1  
2 is that correct?

3 MR. GUTTON: Yes. That's right.

4 MR. PATRY: Would you agree that  
5 for living artists galleries probably  
6 constitute the larger market, in  
7 other words, more sales are made  
8 to galleries?

9 MR. GUTTON: Certainly.

10 MR. PATRY: If droit de  
11 suite is important for artists -- and  
12 I assume you believe it is  
13 important -- and if galleries  
14 constitute the most important  
15 market for living artists, why  
16 isn't droit de suite enforced  
17 for galleries?

18 Aren't artists really  
19 giving up what is their most  
20 important market?

21 MR. GUTTON: But in France we  
22 have an agreement between the auctioneers,  
23 galleries, and artists, too. And it was  
24 with the full approval of the artists that  
25 that decision has been made, but in

1

2 compensation they have to pay the social  
3 security.

4

I want to make a remark. My  
5 opinion is that in no case do galleries have  
6 to pay a droit de suite for the first  
7 sale, because many galleries provide great  
8 help to the artists. And to share the  
9 first work, that would be absolutely  
10 stupid, to apply droit de suite for the  
11 first resale.

12

MR. PATRY: I asked the  
13 question for this reason: If the United  
14 States Congress is to seriously consider  
15 a droit de suite we, of course,  
16 would look to France for your  
17 experience, and the argument might be  
18 something like this: Well, in France  
19 they have a droit de suite that applies  
20 to galleries, but there has  
21 been an agreement entered into that the  
22 galleries don't pay a droit de suite to  
23 the artists, instead they pay into a  
24 social security fund. So, what is really  
25 needed is not a droit de suite



1  
2 for artists, but what we need is some sort  
3 of a change in our social security laws  
4 for artists.

5               So, my question is this: How do  
6 you respond to the argument that droit  
7 de suite is not the most important and  
8 that what is more important is a Social  
9 Security fund for artists?

10               MR. GUTTON: It's absolutely a  
11 different demand. Well, that was the  
12 agreement in France, but it's not  
13 automatically a good example. We must not  
14 mix social security and authors' rights.  
15 We cannot compare anything about it. If  
16 we are studying authors' rights, we are not  
17 studying social securities for me,  
18 it is another study, it's another  
19 reflection, it's another domain, it's  
20 another mind and not the same beneficiaries.

21               MR. PATRY: In Germany,  
22 as I understand, the law applies  
23 to galleries as well. The droit de suite  
24 in Germany, as in France, applies to  
25 galleries. My understanding is that

1  
2 it's collected in Germany, that  
3 if there is a resale through a gallery in  
4 Germany a payment is made to the German  
5 Collection Society.

6 MR. GUTTON: Yes. That's  
7 correct. Absolutely.

8 MR. PATRY: And my understanding  
9 is they also have a social security  
10 fund there as well, that artists who are  
11 members of Bild-Kunst receive monies through  
12 that society's social security fund. I  
13 guess my question might be -- and this  
14 might be an unfair one for you as a French  
15 citizen -- if the United States were  
16 to look at this would the German model be  
17 a better source than the French model?

18 MR. GUTTON: No, for  
19 reasons I mentioned before.

20 MR. PATRY: Now, ADAGP --

21 MR. GUTTON: Yes.

22 MR. PATRY: -- also licenses the  
23 reproduction rights; is that correct?

24 MR. GUTTON: Yes.

25 MR. PATRY: So, in France you

1  
2 have many different rights; you have  
3 the right to reproduce your work, and you  
4 have the right to receive a droit de suite  
5 payment.

6 In terms of dollar amounts for  
7 artists, in your experience, do artists  
8 make more money through licensing the  
9 reproduction right or do they make more  
10 money through the droit de suite  
11 payments?

12 MR. GUTTON: Well, my opinion  
13 is, regarding those last years, that  
14 they made a great deal more money  
15 with droit de suite than with  
16 reproduction rights, even when the  
17 art market decreased.

18 MR. PATRY: When I visited with  
19 you in the summer I believe you showed me  
20 a form or told me about a form with a  
21 waiver that artists can check. If  
22 they want to waive their right to  
23 reproduction royalties, they can do that?

24 MR. GUTTON: Yes, because, in  
25 fact, sometimes an artist considers that

1  
2 it's better to have the opportunity to promote  
3 his work and for the knowledge of his work  
4 to waive the fees.

5 MR. PATRY: So, is your testimony that --

6 MR. GUTTON: Well, I have people  
7 here because sometimes I forget something.

8 MR. PATRY: Yes.

9 MR. GUTTON: I forgot something  
10 important. I said 1700 something members  
11 receive droit de suite. I can tell you  
12 that only a few hundred, maybe 200,  
13 receive reproduction rights. So, with  
14 those figures you can see how droit de suite  
15 is more important than reproduction rights.

16 MR. PATRY: If the droit de  
17 suite were applied to galleries do you  
18 have any guess about how much more  
19 money that would bring in?

20 What I'm trying to figure out is  
21 this: You have a situation where your law  
22 applies to auctions and applies to  
23 galleries, but it's not enforced, and  
24 galleries constitute the largest market,  
25 probably, for living artists. So, what I

1  
2 want to figure out is how big that market  
3 is, what is the difference?

4 And for living artists are  
5 auctions maybe ten percent or is it 20  
6 percent or --

7 MR. GUTTON: Well, it is  
8 difficult to reply accurately; but,  
9 really, with my experience I can reply  
10 it's double. That is my opinion.

11 MR. GUTTON: Maybe it's  
12 only 75 percent; maybe it is a  
13 little more than double,  
14 but something like that.

15 MR. PATRY: Do you think that  
16 will change, that in the future the  
17 French government might promulgate  
18 regulations and enforce them against  
19 galleries, or is that simply a decision  
20 that was made by agreement with artists  
21 and it will stay that way?

22 MR. GUTTON: It seems to me that there  
23 may be a change, especially regarding the E.C.E.

24 MR. PATRY: If the European  
25 Community adopts a droit de suite

1  
2 directive, that would force a change in  
3 France?

4 MR. GUTTON: Absolutely.

5 MR. PATRY: Do you have any  
6 speculation about how likely it is that  
7 the EC will adopt one?

8 MR. GUTTON: Well, the hearing  
9 last November was very positive, that is my  
10 impression. And when I say "my  
11 impression," it's the impression of all  
12 people who were present at the hearing  
13 and who knew the issue.

14 Naturally, it was the impression of  
15 some artists who were present, too.

16 MR. PATRY: Thank you.

17 MR. GUTTON: I'm sorry, but  
18 Madame Ramonbordes told me that maybe I  
19 didn't understand exactly your last  
20 question, Mr. Chairman, because she told  
21 me my reply was not a good one.

22 Is it possible for you to repeat  
23 it?

24 MR. OMAN: Sure.

25 The question was whether or not



1  
2 you think the droit de suite in France and  
3 Germany encourages artists to sell their  
4 paintings for a low price when they make  
5 their first sale just to get them out in  
6 front of the public knowing that they will  
7 be able to share in any sales that  
8 result in the future? Do they feel  
9 that they don't have to get a high  
10 price at the first sale because this is  
11 not their only opportunity to get  
12 reimbursed for their work?

13 (Discussion held off the  
14 record.)

15 MR. GUTTON: Maybe she can reply  
16 with your permission.

17 MS. RAMONBORDES: Thank you.

18 I'm sorry to take the floor; but  
19 I think, really, the artists, if they know  
20 they will have benefits from the droit de  
21 suite for the successive resale, they can  
22 accept a low price at the beginning  
23 because they know that later they  
24 could benefit from the increase of value  
25 of their work. It is very

1  
2 value, and it's normal that they will pay  
3 the artists because they wanted to make a  
4 profit with the work. It is good that  
5 the artists would benefit from that, even  
6 if the person bought the work for making a  
7 profit.

8 Thank you, Mr. Chairman.

9 MR. OMAN: Thank you very much,  
10 I am grateful for that clarification.

11 Now, let me ask Mr. Andersson  
12 what his prediction will be. Will Finland  
13 and Sweden adopt the droit de suite?

14 MR. ANDERSSON: Well, I don't  
15 know. The item has come up from the  
16 artists' organization in Sweden, but what  
17 they want certainly is a form of social  
18 security because they have suggested that  
19 there should be a ten percent fee on each  
20 resale to go into a fund controlled by the  
21 artists' organization for them to spread  
22 out where they think it might be needed.  
23 They are not talking about a personal  
24 system; they are talking about a kind of  
25 social security, and I am not sure that

1  
2 important for them to know that and to  
3 know that when they sell the work the  
4 first time they will not be deprived of  
5 the benefit from the successive event.

6 I would add one thing, if you  
7 allow me, to what Mr. Patry said  
8 concerning the decrease of value.  
9 When you speak about decrease of  
10 value, you can say that droit de suite is  
11 really crazy in this case. I would  
12 say that when somebody buys a work without  
13 any will to gain money with this work, I  
14 think it would take a long time before the  
15 work would be another time on the market.  
16 In this case it's really impossible  
17 that the value would have decreased,  
18 if you keep a work 20 or 30 years.

19 When there is a decrease of  
20 value, as it's happened nowadays, it's  
21 because of people who bought the works one  
22 or two years ago when the works were at  
23 higher prices and they realized they  
24 wanted to make a profit. So, I think it's  
25 a good thing if they have a decrease of

1

2 they will succeed with that.

3

MR. OMAN: This preoccupation of

4

artists with their livelihood reminds me

5

of the old story that is told about Sam

6

Goldwyn, the Hollywood producer,

7

negotiating with George Bernard Shaw for

8

rights to one of Shaw's plays that Mr.

9

Goldwyn wanted to mount in a motion

10

picture. Mr. Goldwyn kept talking to

11

Mr. Shaw about the importance of the

12

artist making his works available for

13

posterity, by having his play embodied

14

forever in a motion picture so that future

15

generations will be able to appreciate his

16

great art. And George Bernard Shaw kept

17

insisting that Mr. Goldwyn pay him more

18

money for the rights to the play, which

19

Mr. Goldwyn was unwilling to do.

20

Finally, Shaw said, "The trouble is, Mr.

21

Goldwyn, you think only of art and I think

22

only of money."

23

So, we are in the middle of that

24

discussion today.

25

I do wonder what your

1  
2 organization's position is on whether  
3 or not the European Community should  
4 adopt the droit de suite. Have you  
5 made a formal recommendation? Have  
6 you been asked to testify? Did  
7 you submit views?

8 MR. ANDERSSON: Yes, we have  
9 made our point very clear that we strongly  
10 protest against applying droit de suite  
11 for galleries because in certain countries  
12 there is already installed a system of  
13 droit de suite at auctions; but in total  
14 the FIDOA is against it.

15 MR. OMAN: I was wondering  
16 whether or not the lack of harmony on  
17 droit de suite in Europe distorts art  
18 sales on the continent.

19 Do you find that  
20 the art movement is moving  
21 out of France into Geneva? Is  
22 it moving out of England  
23 to Sweden?

24 MR. ANDERSSON: No, I don't  
25 think so.

1

2 I would like to make a comment  
3 on the last question that my friends here  
4 were answering, whether an artist would  
5 sell at a lower price for the first time  
6 because he would earn benefits when the  
7 painting was sold the second time. I  
8 think that you have to realize that most  
9 of the artists that work as full-time  
10 artists, their artworks will never come to  
11 an auction. I mean, how many artists are  
12 there working in New York City?

13 There must be thousands of  
14 them. Most of those artists cannot  
15 sell every piece they make. If you  
16 go to artists' studios, they are  
17 full of art pieces that they could not  
18 sell because people are not asking for  
19 their works.

20 The auction houses choose only  
21 pieces that they think they can sell.  
22 If you own an art piece and go to an  
23 auction house, it is not sure that they  
24 will take it. Most of it is turned down  
25 because it is unsellable. I mean, we are



1  
2 not talking about Rauschenberg and Stella,  
3 and all these guys, but all the other ones  
4 that fight for their living each day.  
5 Auctions are not a reality for those guys,  
6 and never would they sell something cheap  
7 because they think that they can make  
8 money on the resale at an auction. They  
9 will try to get as much as possible to pay  
10 their daily bills.

11               Because of this situation  
12 that is a reality for me working  
13 with living artists. This is not the  
14 big question for us because selling things  
15 in auctions is something that matters for  
16 a few artists, and probably when they are  
17 so old and so reputable that three percent  
18 of something is not a big question for  
19 them.

20               As the question is new  
21 for me, I'm innocent enough to ask,  
22 "why should it be like this." Can  
23 anyone explain to me why we should pay a  
24 fee when the painting is sold the next  
25 time unless it is a sort of a social

1  
2 security?

3 MR. OMAN: Monsieur Gutton, do  
4 you want to jump back in?

5 MR. GUTTON: Thank you, Mr.  
6 Chairman.

7 I want only to repeat that there  
8 is nothing common between social security  
9 and an artist's right. And it's clear in  
10 the same way in the mind of the artists, I  
11 know many of them.

12 I want to add that in France you  
13 have more than 400 auctioneers, and all of  
14 them prepare a catalog for each sale, and  
15 you see in the catalogs works which are  
16 offered at a very low price, for instance,  
17 \$500, or \$1,000, and so on.

18 When you study the catalogs of  
19 Christie's, and Sotheby's, and so on, you  
20 have only works whose price is more than \$10,000  
21 and nothing else; it is a speculative market.

22 MR. OMAN: I will turn the forum  
23 over to Mr. Patry; maybe he can answer a  
24 question that occurred to me after hearing  
25 the panel discuss the issue.

1

2                   Do artists in the  
3   United States qualify  
4   for social security or  
5   payments made by people  
6   on their behalf?

7                   MR. PATRY: I don't know the  
8   answer, but maybe Dr. Feder or some of the  
9   artists who will be testifying from  
10   Artists Equity will.

11                  Maybe I could continue on the  
12   questions that Mr. Oman asked and Mr.  
13   Gutton just responded to, which is --  
14   and this is for Mr. Andersson --  
15   what factors go into a dealer's  
16   decision of where to sell and  
17   for how much.

18                  One of the arguments that one  
19   hears that you apparently don't  
20   particularly agree with, is that if there  
21   is a droit de suite in one area the sales  
22   that were former in that area will go  
23   someplace else.

24                  My question is this: I am  
25   a dealer, I have some art that

1

2 I am thinking of selling, what factors  
3 will I consider? Price, value, taxes,  
4 commissions, in certain places, what the  
5 character of the market is?

6 Obviously, I want to get the  
7 best price I can for anything that I  
8 sell, but what factors does one consider?

9 MR. ANDERSSON: You're talking  
10 about the situation with an art dealer  
11 who is sitting on unique pieces wanted on  
12 an international market. If I  
13 had a unique Picasso, or Cezanne, or  
14 whatever, of course, I would try to sell it  
15 where I could get the best profit at the  
16 least costs. But I mean, talking  
17 about the situation for all  
18 artists, this situation is not so  
19 common for most of them.

20 MR. PATRY: Most of the art  
21 market is local, in fact.

22 MR. ANDERSSON: Yes.

23 MR. PATRY: In terms of  
24 whether or not to sell in that market  
25 it's not whether a particular value added

1

2 tax or a particular droit de suite comes  
3 in, you are just not going to pick up and  
4 sell someplace else. You can't; either  
5 that is your market or you don't do it.

6 MR. ANDERSSON: Yes, probably.

7 I mean, if I have things that I cannot  
8 sell in my gallery, pieces that are so  
9 difficult to sell that I need to give them  
10 to an auction house, I know that I will  
11 have some money for it; but I will not  
12 gain a big profit if I'm talking about  
13 local artists that are reputed enough so  
14 that the auction houses will take them,  
15 but they are not so well reputed that I  
16 can go to an international market with  
17 them.

18 MR. PATRY: Sweden, as you  
19 mentioned, does not have a droit de  
20 suite --

21 MR. ANDERSSON: No.

22 MR. PATRY: -- provision; but I  
23 understand it does have taxes.

24 MR. ANDERSSON: Oh, yes.

25 MR. PATRY: My question is

1  
2 this: What taxes do you as a gallery owner  
3 or dealer pay and what percent are they?

4 In other words, when you sell a  
5 work of art what sort of taxes and how  
6 much do you pay on those?

7 MR. ANDERSSON: When a painting  
8 is sold the first time we don't pay any  
9 taxes directly on the sale. Of course, in  
10 my company I pay taxes on a yearly basis,  
11 but that is another thing. I pay taxes on  
12 the company's profit; but we don't have  
13 any VAT or something like that, when I  
14 sell a painting for the first time.

15 The artist has to take  
16 care of social security himself.  
17 The artist is looked upon from a  
18 physical point of view as a small  
19 company. So the artist has to make  
20 an income declaration at the end of the  
21 year; he has to pay a certain percentage  
22 to the social security system. He also  
23 has to pay income tax if he earns that  
24 much money that anything is left for him.

25 MR. PATRY: But you don't pay



1  
2 any particular value added tax or the  
3 buyer does perhaps?

4 MR. ANDERSSON: No.

5 MR. PATRY: If a work of art is  
6 resold, no one pays any taxes on that?

7 MR. ANDERSSON: If it is sold a  
8 second time it's in the VAT system, then I  
9 pay twenty-five percent VAT. And that is  
10 the same percentage that is on every  
11 purchase in Sweden.

12 MR. PATRY: So you pay  
13 twenty-five percent?

14 MR. ANDERSSON: Yes.

15 MR. PATRY: What about the  
16 buyer?

17 MR. ANDERSSON: Nothing.

18 MR. PATRY: What is the average  
19 commission?

20 You don't have to say what yours  
21 is, but in your country.

22 MR. ANDERSSON: That's no  
23  
24  
25

1  
2 secret. I would say it's between  
3 thirty-five and fifty percent.

4 MR. PATRY: So you have got  
5 that commission, and you have  
6 got twenty-five percent value  
7 added tax for a resale?

8 MR. ANDERSSON: Yes.

9 MR. PATRY: My question is:  
10 If, as in France, you have a three percent  
11 droit de suite, why is droit de suite such  
12 a big deal?

13 It seems like such a tiny  
14 percent compared to both the  
15 commission that is charged and the value  
16 added tax.

17 MR. ANDERSSON: Yes, I agree  
18 with that. The problem is for me to  
19 understand why you should have it, why  
20 should there be a certain fee when you  
21 sell a painting the second time when you  
22 have not the same thing if you sell a  
23 house for the second time, or a car for  
24 the second time, or whatever.

25 MR. PATRY: My purpose

1  
2 here is to get information, and  
3 ask questions, not to make either  
4 side's arguments. Perhaps the  
5 argument would be two-fold. One, it  
6 does help artists, presumably any amount  
7 of money that they have beyond what they  
8 had before is a help to them and might  
9 encourage them to create more works,  
10 which might help you, too,  
11 because you would have more to sell.

12           The other argument might be that  
13 works of art are different from books  
14 because a book is sold in multiples and  
15 makes money that way, whereas with  
16 paintings, as Mr. Gutton said, the  
17 reproduction right is not a very large  
18 amount of money and they make more from  
19 resale. Those might be the  
20 arguments.

21           MR. ANDERSSON: But -- excuse  
22 me.

23           MR. PATRY: Yes.

24           MR. ANDERSSON: I mean, those  
25 arguments -- the first argument is sort of

1  
2 a social security argument.  
3 Artists are low paid people; they need to  
4 get money wherever they can get it.  
5 If droit de suite is a way that has been  
6 working in some countries for a long time,  
7 of course, they want to keep it.  
8 Everyone wants to have money wherever  
9 they can have it.

10 MR. PATRY: If in the EC a  
11 three percent droit de suite was  
12 adopted, do you think that  
13 would depress art sales, that  
14 fewer works of art would be sold?

15 MR. ANDERSSON: Altogether it's  
16 very difficult to sell art these  
17 days, and everything that raises  
18 the prices is negative.

19 MR. PATRY: But my question  
20 is, do you think three percent --  
21 assume that is the French experience --  
22 is of such caliber that it  
23 would reduce materially  
24 the number of works of  
25 art that are sold?

1

2           MR. ANDERSSON: Yes. It is the  
3 same as the story about the man who  
4 worked in the woods and had a horse that  
5 was supposed to pull home the timber for  
6 him. He said, if you take this one  
7 then, you can take this one; and if you can  
8 take that one, you can take this one.

9           It is always a  
10 question of putting small fees on  
11 everything. One of the fees that is  
12 important is the total fees, the VAT, and  
13 droit de suite, and administration costs,  
14 and whatever.

15           MR. PATRY: In terms of the  
16 European Community, I believe that England  
17 is probably the largest country that  
18 presently does not have a droit de suite,  
19 at least in terms of the artwork;  
20 correct?

21           MR. ANDERSSON: Probably, yes.

22           MR. PATRY: If the European  
23 Community does adopt a droit de suite  
24 would that be helpful in terms of  
25 harmonizing things?

1

2 Do you think that for  
3 international sales, if the EC did  
4 adopt droit de suite then sales would come  
5 to New York, perhaps?

6

MR. ANDERSSON: I can't  
7 find any way where it would be helpful to  
8 have droit de suite. The harmonization,  
9 as I see it, would be if  
10 everybody took it away.

11

MR. PATRY: In terms of  
12 Sweden, I understand the EFTA  
13 countries, Sweden, Finland, and some  
14 of the neutral countries, have an  
15 agreement with the European  
16 countries right now, a protocol  
17 that has provisions on  
18 intellectual property.

19

Do you think it's likely that  
20 if the European Community adopts a droit  
21 de suite directive, EFTA countries would  
22 have one as well? So that you'd have a  
23 situation all throughout Europe where every  
24 country would have droit de suite, and it  
25 wouldn't be that big of a problem?



1

2                   MR. ANDERSSON: I don't think  
3 that this is a big question for the  
4 agreement between EFTA and the EEC.  
5 Norway has a sort of -- well, it is not  
6 droit de suite -- it's a three percent fee  
7 on everything that is sold that is  
8 controlled by an organization. It is  
9 not individual for the artists.

10                   MR. PATRY: Thank you.

11                   MR. OMAN: One follow-up  
12 question for Mr. Gutton.

13                   It wasn't clear in  
14 my mind whether or not your  
15 organization is limited to  
16 French nationals or whether non-  
17 French nationals can join your  
18 organization.

19                   MR. GUTTON: Well, ADAGP is managing  
20 rights of its French and foreign members in  
21 France, naturally, and throughout the world  
22 in more than 30 countries with other author  
23 societies located all over the country.  
24 We have an assistant society in New York,  
25 and Mr. Feder is the Chairman of the

1  
2 society. They have to represent the  
3 rights of members in each country as we  
4 represent the rights of the members in our  
5 own country.

6 MR. OMAN: I wanted to  
7 clarify that point for the record and  
8 have no further questions.

9 Thank you very much for your  
10 very valuable contribution; we are very  
11 grateful for it.

12 We will now excuse the current  
13 panel.

14 (Panel was excused.)

15 MR. OMAN: The next panel will  
16 be an artist and an art dealer. The  
17 artist is Hans Haacke and the art dealer  
18 is Mr. John Weber. Will they take the  
19 table? If I were to guess  
20 I would say the artist,  
21 Mr. Haacke, is on my left  
22 and the art dealer, Mr. Weber,  
23 is on my right. Is that correct?

24 MR. HAACKE: Yes.

25 MR. OMAN: Could we start with

1

2 Mr. Haacke, please?

3

4 MR. HAACKE: I have not come  
5 here with a prepared statement, so I will  
6 speak impromptu.

7

8 I have been working and  
9 exhibiting in New York since 1965. I have  
10 my work in various museums around the  
11 world. Since the 1980's I can say  
12 there is a degree of public recognition  
13 for my work which also has resulted in an  
14 increase in the prices for which my work  
15 is sold.

16

17 Early in the 1970's, around 1971  
18 or 1972, here in New York, an attorney by  
19 the name of Bob Projansky, together with a  
20 friend of artists' promoter and  
21 commentator, who was not a dealer, I might  
22 add, developed a contract regarding  
23 artists' rights which included a paragraph  
24 or two on the topic that is under  
25 discussion here, namely resale royalties  
to artists if a work is sold for profit.

26

27 The contract as it was designed,  
28 and which I have adopted personally since

1  
2 1972, was published in international art  
3 magazines. It was also published in the  
4 catalog of the international art exhibition  
5 document in Kassel, Germany, in 1972. The  
6 percentage of the profit of a resale  
7 provided for in this contract is 15 percent:  
8 It goes to the artist, and it goes, if I  
9 remember well, to the artist's heirs until  
10 25 years after his or her death.

11 I have adopted this contract  
12 because in my view it would be only fair,  
13 it would be a moral right, and it would be  
14 in tune with my sense of justice if an  
15 artist participates in the profits that  
16 are made from his or her work after it has  
17 left his or her hands, after it has entered a  
18 market over which the artist has no  
19 control.

20 Most artists, with very few  
21 exceptions, start with a very weak economic  
22 footing. They are at the mercy of the prevailing  
23 economic climate. Today we know that young  
24 artists are losing even the small paying jobs  
25 that used to be available. It's even difficult

1

2 for them to get cab driving jobs.

3

4 Perhaps different from other

5

6 college-educated people -- and most

7

8 artists today have a college education --

9

10 they are gambling with their life when they

11

12 decide to become independent artists.

13

14 They gamble! Like an investor they gamble,

15

16 with the difference, however, that an investor

17

18 doesn't do it with his own life, but with

19

20 his or, for that matter, somebody else's money.

21

22 I think it is only fair if the artist does

23

24 not gamble his or her life for the exclusive

25

26 profit of somebody else.

27

28 I value collectors; I value

29

30 museums that buy artists' work; but I

31

32 think artists should have a share in

33

34 the profit that is made from their work.

35

36 My experience with this contract

37

38 has been that in the 1980's -- that is to

39

40 say 10, 15 years after I started using it,

41

42 I began to benefit from my stubbornness

43

44 in insisting that any collector

45

46 who is interested in my work sign this

47

48 agreement with me.

1  
2                   Not too long ago a work that I  
3 sold in about 1972, 1973 for \$5,000 was  
4 resold to the French National Museum of  
5 Modern Art at the Centre Georges Pompidou  
6 in Paris for a figure in the six  
7 digits. Had I not signed a contract  
8 with the signature of that first collector,  
9 I would have been totally without any  
10 participation in the profit.

11                   There have been two works  
12 sold at auction here in New York, one  
13 at Christies, one at Sotheby's. On both  
14 occasions the contract was in force, and I  
15 received royalty payments.

16                   There was a somewhat  
17 amusing occurrence at the first auction.  
18 The auctioneer, of course, had  
19 to announce the fact that there were  
20 strings attached to the item for  
21 sale. A rather well-known dealer  
22 from London burst out in laughter  
23 yelling for everybody to hear (until  
24 then the auction had been stone silent):  
25 "He must be kidding!"



1

2                   MR. WEBER: No, he said, "Let  
3 it pass."

4

MR. HAACKE: -- which  
5 demonstrates to me, and perhaps also to  
6 you, the mentality of some dealers.

7

                  I should add immediately  
8 that there are exceptions to the rule,  
9 among them my dealer here, John Weber, who  
10 has always supported me in the application  
11 of the contract.

12

                  The work was, in fact, sold  
13 at a much higher price than any one  
14 had expected.

15

                  I listened to the previous  
16 testimony and I was puzzled by the  
17 insistence of those who oppose resale  
18 royalties on the "social security" aspect.  
19 I am not aware of the fact that those who  
20 promote this "social security" aspect have  
21 gone out of their way to promote social  
22 security for artists, that funds are set  
23 aside by big collectors, big auction  
24 houses for the support and for the  
25 promotion of less known artists who do not

1  
2 command high prices. Therefore, I find this a  
3 somewhat disingenuous argument.

4 I think an artist should have a  
5 right over his or her work beyond the  
6 point of the initial sale. It should also  
7 be part of the artist's right to then be  
8 able to decide what to do with his or her  
9 share of the resale profit; we are talking  
10 about only 15 percent of the profits in my  
11 case. What I hear from other proposals  
12 amounts to much less than 15 percent.  
13 The artist should have a say over what is  
14 to be done with this small portion: Whether  
15 he or she puts it into a fund to help other  
16 artists, whether it goes into the college  
17 education of the artist's children, or  
18 wherever the artist may want to put it.

19 That is all I would like to say  
20 for the moment.

21 Thank you.

22 MR. OMAN: Thank you very much.

23 We appreciate your testimony, and  
24 we will save the questions for  
25 the conclusion of the testimony of Mr.

1

2 Weber.

3

Mr. Weber.

4

MR. WEBER: Thank you very

5

much.

6

Mr. Haacke took most of my

7

message out of my mouth. I guess that is

8

the advantage of going first.

9

I have been an art dealer for 32

10

years. Prior to that time I had worked in

11

the museum field. I have a gallery in New

12

York, and I share with two other people an

13

international gallery in Madrid, Spain.

14

I am somewhat surprised,

15

although I understand the resistance of

16

many of my colleagues in the art gallery

17

field, although not all, to what I feel is

18

a very just and deserving situation that

19

is difficult.

20

I have been using a form of

21

artists' rights contract for many years,

22

not only in the case of Hans Haacke, but

23

also in the case of the French artist,

24

Daniel Buren, who is somebody whom I have

25

shown relatively successfully. Perhaps

1  
2 he is one of the leading French artists at  
3 this point of time in terms of reputation  
4 for a period of some 17 years.

5 I am concerned about the  
6 attitude of my fellow dealers. I know  
7 that we are by nature, as are most  
8 businessmen, conservative on the whole. I  
9 know that we react very protectively to  
10 any governmental control which might be  
11 put upon our profession because we,  
12 fortunately, or in some cases  
13 unfortunately, are not under any close  
14 scrutiny or under any supervision from any  
15 legal standpoint. It's a profession where  
16 people feel that, well, art really isn't a  
17 serious endeavor, and, so, there is no  
18 regulation of it. I think that we've  
19 gotten used to this attitude, and we are  
20 afraid that this will be the breaking of  
21 the dike, so to speak.

22 We daily engage in illegal  
23 activities, that were we regulated would  
24 have to come to an end. There is  
25 international price fixing, all kinds of

1  
2 procedures which are going on, have gone  
3 on, are totally accepted, considered  
4 normal. I think that the art dealers'  
5 reaction to something, which I feel is  
6 just, is because it's sort of a fear in  
7 general that, as my colleague from Sweden  
8 says, the dam will break, it's only a  
9 beginning, so on, and so forth. I  
10 disagree with that.

11               There were some issues brought  
12 up which, when one thinks of the artists'  
13 resale royalties, are somewhat  
14 stereotypical. For instance, I have had  
15 collectors on occasion say to me, "If I  
16 have to pay for the up side of the  
17 valuation, then why doesn't the artist pay  
18 for the down side of the valuation?" That  
19 was brought up today.

20               My answer to that would be that  
21 the only way to generate money for artists  
22 is to put the objects which are made by  
23 the artists into the commercial  
24 capitalistic society of commodities, that  
25 generates money for the whole system, and

1  
2 also, obviously, a major proportion of the  
3 share to the creator.

4           However, in its dealing with the  
5 capitalistic system we do not expect, with  
6 the exception of Japan, that when a stock  
7 people purchase goes down in value there  
8 is a pay back on that, nor is there with  
9 any other commodity in this consumer  
10 international community. When a car  
11 devalues we don't expect money to come  
12 back because of that. It would seem  
13 to me that that particular argument, the  
14 artist don't pay it if it goes down in  
15 value, is not valid one.

16           Also, I heard the argument today  
17 only well-known artists benefit from a  
18 resale clause and younger artists who are  
19 not in the marketplace do not. I answer  
20 that by saying this is not a static time  
21 situation, younger artists become older  
22 artists. At this time younger artists who  
23 are totally unknown, who have no  
24 reputation, who perhaps are not doing  
25 valid work, do change, grow older. If



1  
2 they are lucky their reputation is  
3 increased and there would be value.  
4 Wouldn't they feel rather silly as  
5 Rauschenberg did years ago when something  
6 he had sold for \$500 turned over for many  
7 hundreds of thousands of dollars.

8               So that the argument that the  
9 younger artists do not and never would  
10 benefit from this kind of situation, I  
11 don't feel is germane to the issue.

12              In closing, I would like to say  
13 that Hans and I have been working  
14 together, what, since 1973?

15              MR. HAACKE: Approximately.

16              MR. WEBER: And the same with  
17 Daniel Buren.

18              Pragmatically speaking, I have  
19 never lost one sale in some almost 20  
20 years of time dealing with this contract  
21 with either Hans Haacke or Daniel Buren.

22              Sometimes it's awkward when we  
23 sell a piece to an institution like, say,  
24 the Tate in London, who signs the  
25 contract. There were situations that came

1  
2 up like that, does the President, does the  
3 Chairman of the Board, does the whole  
4 Board, et cetera, et cetera. Those were  
5 just mechanics.

6 I think that the gallery has  
7 profitted from this experience. It makes  
8 me feel better about myself; it makes me  
9 feel that we are not taking it all. And I  
10 think that the artists certainly will  
11 benefit.

12 One other factor, some artists  
13 as they get older lose their reputation;  
14 they repeat themselves; they might become  
15 ill, infirmed, senile. Why not have this  
16 potential benefit for them to look forward  
17 to as well?

18 Thank you.

19 MR. OMAN: Thank you very much,  
20 Mr. Weber.

21 Just out of curiosity, when you  
22 insist on this provision in the contract,  
23 is that negotiated, and do they pay  
24 you less money as a result of that  
25 provision being in the contract?

1

2                   MR. WEBER: Not at all. No,  
3 that is not a factor.

4                   MR. OMAN: What percentage  
5 of artists that you  
6 represent have contracts  
7 similar to this?

8                   MR. WEBER: In the early 1970's  
9 it was somewhat a fashion to do this, to  
10 use this contract, and many artists,  
11 particularly many of the conceptual  
12 artists were using it. So that I have  
13 sold many works of Carl Andre with a  
14 contract, et cetera, et cetera.

15                   As time goes on, as the  
16 production of work increases, it became  
17 difficult for some artists just  
18 physically to keep track of where their works  
19 were. And it was self-controlled. I  
20 mean, the gallery or the artist has to  
21 take care that if a work comes up for  
22 auction that the auction house understands  
23 that there is a contract and so  
24 forth. That became somewhat awkward  
25 for some people.

1

2           As I said, I represent 14  
3 artists in America and 24 artists in  
4 Spain, but only two of them use  
5 a contract.

6           MR. OMAN: It lasts  
7 just for the second sale? It  
8 wouldn't bind a third party  
9 for a subsequent sale?

10          MR. WEBER: No, it's binding ad  
11 infinitum. We have had third generation,  
12 and in some cases fourth generation  
13 payments.

14          MR. OMAN: Have there been any  
15 jurisdictions where you have not been able  
16 to enforce that contractual right?

17          MR. WEBER: No. Generally, in  
18 the case of Hans, Hans does work which  
19 usually has references to political or social  
20 injustices, and the type of individual  
21 that would identify with this work --  
22 actually Hans is kind of the founder of  
23 this whole situation, which is very much  
24 popular now, particularly in America and  
25 Europe, many, many thousands of artists

1  
2 are doing what is called political work.  
3 We have never had, really, a problem with  
4 it because we keep very good records as to  
5 who was on first and who was on second,  
6 where the works are.

7               Also, it's tied in -- I  
8 am not so sure in your case, Hans -- but in  
9 Daniel Buren's case the work ceases to  
10 exist as a work of art if the terms of the  
11 contract are not met. The contract  
12 is a valid operating contract and has also  
13 the certificate of authentication of the  
14 work tied in. So, there's a little hook  
15 there.

16               MR. OMAN: Do the rights under  
17 the contract pass to heirs upon the death  
18 of the principal or do they terminate at  
19 that point?

20               MR. WEBER: They  
21 pass onto heirs for, I  
22 believe, a period of  
23 25 years.

24               MR. WEBER: I don't think that I  
25 finished one thought quite accurately. I

1  
2 was talking about Hans being a political  
3 artist. The type of individual, either  
4 the profile of a museum or collector,  
5 would be such that if they identify with  
6 the work and recognize its input from an  
7 aesthetic level, they also are  
8 automatically sympathetic to the contract  
9 because that means they are people who are  
10 of, perhaps, more liberal leaning, to use  
11 an old-fashioned term.

12 MR. OMAN: I won't touch that  
13 one with a ten foot pole.

14 How do you explain the  
15 opposition of some of your fellow art  
16 dealers to droit de suite?

17 MR. WEBER: Well, I think that I  
18 touched on that. I think it's just a fear  
19 of governmental control. I don't feel  
20 that revenues will be decreased in the  
21 galleries or sales will be decreased  
22 because of that, because it is the second  
23 time around, it is the resale that we are  
24 considering.

25 During the last panel I figured



1  
2 out that in my gallery only about five  
3 percent of our total annual sales are  
4 resale because we are what is known as a  
5 primary gallery, we represent artists. I  
6 mean, our job is to represent artists, it  
7 is not to sell paintings. For the most  
8 part, the paintings, sculptures, or what  
9 have you seem to sell themselves as  
10 opposed to a secondary gallery where most  
11 of the inventory might be thought of as  
12 being resale. As I say, it doesn't really  
13 come up that much, perhaps five percent of  
14 the gross would be involved. So that I  
15 can say economically, be it three percent  
16 or five percent, it really isn't going to  
17 effect any business that much. And I can  
18 project with the primary dealers around  
19 the world it will not affect their  
20 business that much.

21 MR. OMAN: Well, I know that  
22 Senator Kennedy, who had asked us to do  
23 this study, would be very happy to hear  
24 your report. He, most  
25 people don't realize,

1  
2 is an amateur artist himself.

3           Senator Kennedy mentioned several  
4 months ago that his political friends urge him  
5 to spend more time as an artist and some of  
6 his artist friends urge him to spend more  
7 time in politics. But he does have a  
8 basic sympathy for the plight of the artist,  
9 and I think that he and Mr. Markey, the  
10 Congressman from Massachusetts,  
11 will be very eager to  
12 read our report.

13           Let me ask Mr. Patry to ask his  
14 follow-up questions.

15           MR. PATRY: Do you  
16 use the original Projansky  
17 agreement?

18           I thought that there had been a  
19 rescission and then maybe some alternates  
20 of what other people use.

21           MR. HAACKE: I use the  
22 original agreement with minor modifications  
23 which do not pertain to the subject under  
24 discussion here; they speak about exhibition  
25 rights and the time for which I can

1  
2 borrow the work for exhibitions.

3 MR. PATRY:

4 Ten days or something like  
5 that?

6 MR. HAACKE: Yes. I have  
7 modified that.

8 MR. PATRY: Mr. Oman had asked  
9 about enforceability, and it's nice that  
10 you haven't had those problems.

11 Who do you think the third  
12 and fourth generation agreements  
13 are enforceable against, if  
14 you had a situation where  
15 the third or fourth person  
16 refused to sign it, or didn't  
17 sign it? In terms of working  
18 the system out, one of the  
19 things that Congress might ask  
20 is, well, we read your  
21 testimony and it was very helpful;  
22 maybe we don't need legislation,  
23 maybe your situation is a good model.  
24 Instead everybody should use the  
25 Projansky agreement or something like that.

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Is yours a good real model for  
everybody?

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Should we just encourage  
people to use it or are you in a  
unique situation so that you are  
able to use it?

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11

MR. HAACKE: Well, let me try to  
answer that. In fact, I believe  
there are several questions.

12

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14

To begin with, since it is a  
contract, as with all contracts, it would  
potentially be legally enforceable.

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Once it was necessary for me, in  
Europe, to have an attorney write  
a letter to a collector who sold a work of  
mine and "forgot" that he had signed  
the contract; but immediately  
afterwards I was paid what was due.

21

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As John Weber pointed out, there  
is another aspect in my -- and probably  
also Daniel Buren's contract, I don't know  
which form he actually uses -- that is of  
interest to both the collector who sells

1

2 and the collector who has an interest in  
3 buying the work, the contract is the only  
4 form of authentication. I do not sign my  
5 work. Consequently, only with the contract  
6 is a work recognizably a work that I made.

7           There was an instance, not too  
8 long ago, when a work drawing of mine from a  
9 collector in Germany who had died appeared  
10 at an auction here at Sotheby's. When I  
11 heard about it and I saw the reproduction  
12 of this drawing in the auction catalog I  
13 did not remember ever having made this work  
14 drawing as a preparation for a  
15 work. Had I been asked, "Is this really  
16 yours?" Most likely I would have said: "No,  
17 this is a fake!" But I looked in my files  
18 and I discovered that, indeed, this collector  
19 had signed the contract on his drawing way back  
20 in 1972. Therefore, I could  
21 ascertain -- and, presumably, a similar  
22 form signed would be in the selling  
23 party's files -- that, indeed, it was an  
24 authentic work of mine. So, there's a  
25 benefit for the collection as well.

1  
2                   As far as legislation is  
3 concerned that would benefit artists who  
4 do not use this contract, I do not propose  
5 that every artist act as I do. I think I  
6 am operating from a position of relative  
7 strength, insofar as I have had a  
8 teaching job since 1967, a full-time teaching  
9 job with tenure; I can afford to say to a  
10 potential buyer, "If you don't want to play  
11 ball with me, your sole interest in  
12 buying my work is to have  
13 complete control over  
14 everything in it, including  
15 whatever profits could be  
16 gained from it, and you  
17 are not willing even to share a few  
18 percent with me, I don't want to have  
19 anything to do with you; I don't want you  
20 to be the custodian of my work."

21                   Most artists cannot afford  
22 this. Most artists, particularly the  
23 young ones who are trying to get a foot in  
24 the door, are happy for every sale that  
25 comes along, and it is normal that they



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2 would waive anything of this nature if it  
3 would impede a sale they are hoping  
4 for. They have to pay their rent, they  
5 have to pay for their kids, they have to  
6 pay for materials, et cetera. They are desperate.

7

However, if there were legislation  
8 they would not have to waive their rights  
9 in order to improve their economic  
10 position. In this they would be  
11 supported by Congress; they would  
12 be supported by the country. They would  
13 have a sense of justice regarding the  
14 division of profits made from their work.

15

MR. PATRY: That does raise a  
16 question about any legislation.

17

Last year, effective June, a law  
18 went into effect giving visual artists  
19 certain moral rights. One of the issues  
20 there was whether those rights should be  
21 waivable.

22

There are two ways, of course,  
23 it can work. One is can you transfer your  
24 rights, sell your rights, so a  
25 third party owns your rights, which we

1  
2 consider to be alienation?  
3 Moral rights and droit de suite  
4 in Europe are not transferable,  
5 are not alienable.

6 Another question, though, is  
7 whether they should be waivable, whether  
8 you can say for a particular sale, yes, I  
9 have a right under a statute to this  
10 artist resale royalty, but in your case I  
11 am going to waive it. You could  
12 draft legislation either way.

13 If one were to draft  
14 legislation that would make the right  
15 waivable would that gut the  
16 provisions of the law because collectors  
17 would require it to be waived in either  
18 case?

19 The flip side of the question  
20 is: If you say in the statute you can't  
21 waive it are you somehow taking away  
22 artists' freedom, and then they just go  
23 ahead and waive it anyway?

24 You can't force people to take money.  
25

1

2                   What would be the best solution,  
3   do you think?

4                   MR. HAACKE: I think it's very  
5   tricky. On the one hand, one could make a  
6   good argument, I believe, for granting the  
7   artists the right to waive it. We all are  
8   sympathetic to freedom.

9                   The fear, however, that I have  
10   is that, particularly on artists who  
11   don't have a standing, who don't have  
12   clout yet, there will be pressure  
13   by the dealer, by the collector, by  
14   whoever has an interest in this, to waive  
15   it. Then we would be back at the situation  
16   where we are right now.

17                  MR. PATRY: Do you think that  
18   there would be a fear -- I heard in  
19   California when I was out there  
20   there was a fear among some artists  
21   of being blacklisted; if you  
22   had these rights and you  
23   tried to enforce them it will  
24   hurt your primary market, which  
25   after all, for most art is

1  
2 more important. Perhaps Congress  
3 shouldn't be wasting its time on the  
4 secondary market, but should be doing  
5 things to try and increase the primary  
6 market.

7 A collecting society is perhaps a  
8 partial solution, but do you think that is a  
9 reasonable fear, and if so is there any  
10 way one could take care of that?

11 MR. HAACKE: I think if there  
12 were legislation that was binding around  
13 the country and if it were uniformly enforced  
14 there is no reason for such fear.

15 I don't know whether the analogy  
16 applies; if there were uniform legislation  
17 on gun control, we probably would be  
18 better off.

19 MR. PATRY: Yes. Living in the  
20 District of Columbia, as we do, we have  
21 the strictest gun control laws in the  
22 country, but it doesn't do much good, you  
23 can go across the river to Virginia and  
24 buy guns.

25 I had one other question for you,

1  
2 Mr. Haacke. Are you selling your works in  
3 Europe, and if so do you get resale  
4 royalty payments for sales in Europe?

5 MR. HAACKE: Yes, the contract  
6 is a contract that I use all around the  
7 world.

8 MR. PATRY: But you get them  
9 only by virtue of the contract; you don't  
10 get them by virtue of the fact that there  
11 may be a law in France or Germany because  
12 it doesn't apply to you as a United States  
13 citizen?

14 MR. HAACKE: I believe if I were  
15 to work with the German agency -- I don't  
16 know about the French agency -- they would  
17 also collect.

18 MR. PATRY: If it were true  
19 that the only way you could collect would  
20 be because of contract, that the French  
21 and German societies would say, no, I'm  
22 sorry, our law only applies if the United  
23 States has a law, would you be losing  
24 money there?

25 In other words, is it an

1  
2 argument that we should adopt droit de  
3 suite in the United States because there  
4 is an appreciable number of American  
5 artists who are not benefitting from  
6 resales in Europe?

7 MR. HAACKE: I believe the  
8 German system would cover me if I were to  
9 make my interests known. I have spoken to  
10 them at some point and that was the  
11 impression I got.

12 MR. PATRY:

13 Thank you.

14 MR. OMAN: Thank both  
15 of you very much. If you have  
16 any further views you would  
17 like to submit for the record,  
18 we would be happy to  
19 receive them.

20 We may have some follow-up  
21 questions as well after we look over the  
22 transcript, and we will send those to you,  
23 if appropriate.

24 Again, thank you very much  
25 for giving us the benefit of your views.



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(Panel was excused.)

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MR. OMAN: The next panel is characterized as the Artists Collective Rights Panel. We have Ted Feder from the Artists' Rights Society and Robert Panzer from the Visual Artists & Galleries Association.

Would you please identify yourself for the record?

MR. PANZER: I am Robert Panzer.

MR. FEDER: And I am Ted Feder.

MR. OMAN: Mr. Feder, you are listed first on the witness list, I would ask you to be the first to present your testimony.

MR. FEDER: Thank you very much.

I am the head of Artists' Rights Society, an organization which represents the rights and permissions interests in the United States of a number of the major European rights societies, among them ADAGP and SPADEM of France, Bild-Kunst of Germany, Pro Litteris of Switzerland, and

1  
2 VISUAL of Spain. These organizations  
3 represent the estates of the overwhelming  
4 majority of living artists active in  
5 Europe in this century. Thus, the foreign  
6 artists represented by ARS in the United  
7 States include, among others, Picasso,  
8 Braque, Matisse, Chagall, Miro,  
9 Giacometti, Magritte, Rouault, Beckmann,  
10 Klee, and Kokoschka.

11               ARS also acts on behalf of  
12 American artists. Our U.S. members  
13 include, among others, Jackson Pollock,  
14 and Lee Krasner (through the  
15 Pollock-Krasner Foundation), Milton Avery  
16 (through the Milton Avery Trust), Leonora  
17 Carrington, Arshile Gorky, Robert Mangold,  
18 Sol Lewitt, Mark Rothko, Georgia O'Keeffe  
19 (through the Georgia O'Keeffe Foundation),  
20 and Andy Warhol (through the Estate and  
21 Foundation of Andy Warhol).

22               The 32 national artist rights  
23 societies are grouped under an  
24 international organization called CISAC  
25 (Confederation International des Societes

1  
2 d'Auteurs et Compositeurs).

3 CISAC's activities are directed  
4 towards the accomplishment of four  
5 principal aims:

6 First. To ensure the safeguard,  
7 respect, and protection of the moral and  
8 professional interests stemming from any  
9 literary or artistic production.

10 Second. To watch over and  
11 contribute to respect for the economic and  
12 legal interests attaching to the said  
13 productions, both at the international  
14 level and that of national legislation.

15 Third. To coordinate technical  
16 activities between societies of authors,  
17 artists, and composers and ensure their  
18 collaboration in this field.

19 And, finally, to constitute an  
20 international center of study and  
21 information.

22 The comments I am about to make  
23 are made in response to the queries posed  
24 in the Copyright Office's Notice of Inquiry  
25 on the droit de suite.

1  
2           Question one. The movement to grant  
3 resale rights to artists originated in France  
4 prior to World War I. It was set in  
5 motion by a general concern for the  
6 welfare of the artist and his heirs,  
7 stimulated in part by a widely published  
8 cartoon of Jean-Louis Forain showing two  
9 children dressed in tatters outside the  
10 doors of a posh auction salesroom.  
11 "Look," one of the ragamuffins says to the  
12 other, "they're selling one of daddy's  
13 pictures."

14           The resale right, better known  
15 in Europe as the droit de suite, was  
16 codified in France on May 20, 1920, and  
17 has passed into law in 29 countries. Some  
18 claim that the right would drive down the  
19 first or subsequent sales price of  
20 original works of art, causing hardship to  
21 the creators. However, in no country with  
22 the resale right has this been known to  
23 happen, and informed American artists seem  
24 not unwilling to run this risk.

25           The resale royalty would not, in

1  
2 our opinion, discourage the creation of  
3 new works of art. If anything, it would  
4 encourage them. Insofar as artists are  
5 ever motivated by financial return, it is  
6 bound to heighten such motivation, since  
7 in the event of secondary sales it would  
8 ensure a return to the artist, his family,  
9 or heirs.

10 Question two. The law should cover  
11 creations which may be described as works of Fine  
12 Art, in the somewhat broadened definition  
13 of this term a consensually accepted in  
14 the art world. This enlarged category is  
15 sometimes subsumed within the phrase  
16 "graphic or plastic works".

17 It would not be a bad idea for a  
18 threshold value to be triggered before a  
19 work of art could qualify for the droit de  
20 suite. However, to meaningfully benefit  
21 the maximum number of artists, this figure  
22 should not be too high or too low. A  
23 threshold of \$500 plus or minus \$250 is  
24 probably adequate. Below, the royalty  
25 which would accrue to the creator would be

1

2 very small indeed. If set too high, the  
3 number of beneficiaries would be unduly  
4 diminished.

5

It should not be necessary to  
6 base the royalty on a percentage of  
7 profits from the current sale as compared  
8 to the price received from the previous  
9 one. It is often very difficult, if not  
10 impossible, to trace the sale records of  
11 works of art.

12

Rather than seven percent of  
13 profits, as once proposed in the Senate,  
14 ARS would readily accept a lower rate of  
15 four or even three percent, provided the  
16 royalty were applied across the board as a  
17 flat percentage of the sale price, without  
18 reference to previous sales. This is the  
19 practice in France, Belgium, and Germany,  
20 where the law is easily administered  
21 without the need of bureaucratic  
22 intervention. On the other hand, the  
23 experience of Italy, Portugal, Uruguay  
24 Czechoslovakia, and California, of  
25 computing the royalty on the increase in



1  
2 value over the preceding sale, has not  
3 been successful.

4           Returning to the percentage of  
5 the resale royalty, the present French law  
6 promulgated in 1957, fixes the rate at  
7 three percent. The German law, which  
8 applies to both galleries and auction  
9 houses, mandates five percent. In our  
10 estimation, one of the drawbacks of the  
11 well-meaning Kennedy proposal of 1987 is  
12 that it suggested a rate which was  
13 unusually high, namely seven percent, and  
14 provoked undue opposition. Although we  
15 are none too certain that the hard core  
16 opponents of the resale royalty would be  
17 more amenable to a reduced figure, it is  
18 our view that three percent to four  
19 percent would be adequate.

20           Questions three and four. The term of  
21 eligibility for the resale royalty should  
22 be the life of the artist plus fifty years.  
23 This is also the applicable term in  
24 France and Germany. It should be descendible.

25           It is not coextensive with the

1  
2 copyright in the work, except by  
3 coincidence, nor should it be dependent on  
4 the copyright. In France the copyright  
5 term is life plus 64 years, 203 days  
6 (calculated from the 1st of January  
7 immediately following the artist's death),  
8 and in Germany, life plus 70 years. While  
9 it is very rare for a European artist to  
10 alienate his or her copyright, it can be  
11 done; by contrast, the droit de suite is  
12 considered to be and should remain  
13 inalienable.

14           The right should not be limited  
15 to works created in the United States, and  
16 should clearly include works of foreign  
17 origin sold in the United States. Article  
18 14ter of the Berne Convention calls for an  
19 author or artist to "enjoy the inalienable  
20 right to an interest in any sale of the  
21 work subsequent to the first transfer by  
22 the author of the work," providing the  
23 member country has passed resale royalty  
24 legislation. Berne member states which  
25 have adopted droit de suite automatically

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2 bestow reciprocal rights on other member  
3 states possessing the right. Were the  
4 United States to exclude foreign works,  
5 U.S. works in turn would be excluded from  
6 resale benefits in foreign member states.

7

Another aspect of this same  
8 issue concerns the so-called question of  
9 retroactivity. As presently employed, the  
10 term often serves to deprive foreign  
11 artists of their rights. For example,  
12 U.S. adhesion to Berne (which took effect  
13 on March 1, 1989) is said by some to apply  
14 to existing works of art which have  
15 previously fulfilled the formal  
16 requirements of the U.S. Copyright Law,  
17 namely notice and administration, or to  
18 new works created after the date of  
19 adhesion. Such previous U.S. perceptions  
20 of the copyright law have often served to  
21 deprive European artists of copyright  
22 protection on the alleged principle that  
23 their works were not formally registered  
24 or copyrighted in the United States.  
25 Proponents of this view allege that such

1

2 works are said to have passed into the  
3 public domain in the United States.

4

          This position ignores the fact  
5 that most European works were  
6 automatically copyrighted at the moment of  
7 creation, under Berne and the national  
8 legislation in the country of origin, and  
9 consequently required no formalities for  
10 protection.

11

          A failure to apply Berne to  
12 existing European works contradicts  
13 Article 28 of the Convention:  
14 "This Convention shall apply to all works  
15 which at the moment of its coming into  
16 force have not yet fallen into the public  
17 domain in the country of origin through  
18 expiry of the term of  
19 protection."

20

          The Berne provision also runs  
21 counter to Article VII of the Universal  
22 Copyright Convention, to which the United  
23 States has been a long time adherent.  
24 That provision states, "This Convention  
25 shall not apply to works which are

1  
2 permanently in the public domain in the  
3 said contracting state."

4               In conflict between the U.C.C.  
5 and Berne, the so-called "Berne Safeguard  
6 Clause" incorporated in the U.C.C.  
7 provides that Berne, and not the U.C.C.,  
8 prevails in the relationships between  
9 Berne members. (Viz. Article XVII, and the  
10 Appendix Declaration, Item b of the  
11 U.C.C.)

12               "This Convention shall  
13 not in any way affect the provisions of  
14 the Berne Convention for the Protection of  
15 Literary and Artistic Works or membership  
16 in the Union created by that convention."  
17 (Article XVII of the U.C.C.  
18 subsection 1.)

19               Another section states: "The  
20 Universal Copyright Convention shall not  
21 be applicable to the relationships among  
22 countries of the Berne Union insofar as it  
23 relates to the protection of works having  
24 as their country of origin, within the  
25 meaning of the Berne Convention, a country

1  
2 of the International Union created by the  
3 said convention." (UCC Appendix Declaration  
4 relating to Article XVII[b]).

5           Thus, to apply a resale royalty  
6 prospectively only would serve to  
7 strip the right from all existing  
8 U.S. and foreign works, even though  
9 the latter enjoy the right in nations  
10 having the droit de suite. The terms  
11 retroactive and prospective should  
12 be employed in their proper context here,  
13 (as understood by our Berne partners),  
14 namely that the date of the secondary sale  
15 and not the date of the work's creation,  
16 be the determining factor. Consequently  
17 there would be no retroactive application  
18 of the resale royalty in the sense that the  
19 royalty could never apply to  
20 auction sales which took place prior  
21 to the effective date of the law.  
22 It would apply prospectively, that  
23 is to all auction sales of eligible  
24 works which occur after the effective  
25 date of the law. Eligibility, therefore, would be



1  
2 determined under the existing rule of life  
3 plus 50 years, and within the reciprocal  
4 norms of the Berne Convention.

5           Question five: A system similar to that  
6 which operates in France would seem to be the  
7 simplest and most direct form of administering  
8 the right. In France droit de suite  
9 functions in the following manner: A few  
10 days prior to a given auction, the auction  
11 house receives a list from the rights  
12 society informing it of the titles of the  
13 works and the names of the artists for  
14 which the droit de suite is to be  
15 collected. Such lists are formulated by  
16 the rights societies from the sales  
17 catalogs they receive in advance of the  
18 auctions. After the sale has been  
19 completed, the auctioneer fills out and  
20 returns the list with information on the  
21 sales price and the amount due for the  
22 droit de suite. This is accompanied by a  
23 payment which the society distributes to  
24 the artist involved.

25           The landmark French artists

1  
2 rights law of 1957, which fixed the  
3 current rate at three percent, extended  
4 the resale royalty right to galleries.  
5 However, the law has never actively  
6 been applied to galleries, although  
7 there is some current effort in  
8 France to do so. By contrast,  
9 galleries as well as auction houses  
10 are effectively covered under the  
11 German law.

12 As the right is designed to apply  
13 to sales of a work of art, there is no  
14 basis of application in cases where the  
15 object is presented as a gift or exchange,  
16 and we would not attempt to assign a value  
17 in such cases. Therefore, no resale  
18 royalty would be collected in these  
19 instances.

20 As we strongly recommend against  
21 basing the right on the profit  
22 differential between the present and  
23 previous sale, there would be no need to  
24 maintain a costly and time-consuming  
25 registry of past sales prices.

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The right is commonly

administered by the national artists

rights societies, and ARS is prepared to

perform this function for its very many

European adherents as well as its American

ones and would be willing to do so for all

potential beneficiaries.

9

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Question six: The right should not be

waivable or alienable, lest a collector,

gallery, or museum demand such a waiver as a

condition of its offer to acquire a work.

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Question seven: Finally the California

law should definitely be preempted in the event

of a federal law. The California Resale Royalty

Act of 1977, (Cal. Civ. Code SS 986; 1977 amended

in 1983) has failed on two main grounds: One,

it has proved impossible to determine the

previous sales price of a work, which is

needed to calculate the sum due the

artist, namely five percent of the profit

realized by the sale. And, secondly, it is

very difficult to enforce the law when it

applies to one state only.

25

Thank you very much.

1

2           MR. OMAN: Thank you very much,  
3 Mr. Feder.

4           Now let me turn to Mr. Panzer.

5           MR. PANZER: Thank you.

6           My name is Robert Panzer. I am  
7 the Executive Director of VAGA, the Visual  
8 Artists and Galleries Association.

9           This statement was prepared by  
10 me together with VAGA's founder and Vice  
11 President, Martin Bressler, who  
12 unfortunately could not attend because of  
13 a long-standing prior commitment.

14           VAGA was formed in 1977, a few  
15 years after our member Bob Rauschenberg  
16 had his famous tete a tete with Robert  
17 Scull and about the time that California  
18 enacted its Resale Royalty Law. Over  
19 the years VAGA has been interested in the  
20 resale royalty debate and has actively  
21 participated in it. We testified before  
22 Senator Kennedy in favor of his bill;  
23 discussed Senator Sieroty's bill with him  
24 in California after it was introduced; and  
25 if memory serves correct, debated the

1

2 merits of resale royalty with Steve Weil  
3 before the Bar Association some 13 years  
4 ago.

5           As a membership organization and  
6 copyright collective of visual artists and  
7 estates, VAGA, like ASCAP on a much  
8 grander scale with authors and composers,  
9 is dedicated to the collection of artists'  
10 royalties, and like artists rights  
11 societies, we represent the members of  
12 other societies worldwide and our own  
13 members in the United States. We are  
14 extremely interested in these hearings and  
15 the results that may flow from them. We  
16 are impressed with the thoroughness with  
17 which the Copyright Office is approaching  
18 its mandate.

19           Most of the arguments in this  
20 debate have been made. The testimony at  
21 the San Francisco hearings in January  
22 makes it abundantly clear that most of  
23 what has to be said to you about resale  
24 royalties has been said. What has not  
25 been said will undoubtedly come forth from

1  
2 the impressive international array of  
3 speakers scheduled to come before you  
4 today. What then is there to add? First,  
5 VAGA, as an artists' membership  
6 organization dedicated to the collection  
7 of artists' rights fees for a broad  
8 spectrum of artists and photographers, has  
9 a constituency which is affected by resale  
10 royalty legislation, and that constituency  
11 should be heard.

12               Second, VAGA is in the unique  
13 position of viewing resale royalties as  
14 one piece in a panoply of artists' rights  
15 still to be addressed, and that  
16 constituency should be heard.

17               In anticipation of these  
18 hearings, VAGA sent a letter to our 400  
19 artist members asking them for their  
20 views. We have received a substantial  
21 number of responses and we ask the chair  
22 if we can submit them for inclusion in the  
23 record. The letters run the gamut for and  
24 against resale royalties, and raise about  
25 every issue that there is to raise about



1  
2 such a law.

3           Excerpts from a few of these  
4 letters will, in our view, demonstrate the  
5 vox populi of the segment of our society  
6 most effected by the law; artists and  
7 estates of artists.

8           Jack Youngerman wrote in favor  
9 of resale royalties saying that it is  
10 "only basic economic justice."

11 He goes on and says,  
12 "Congress and museums are properly  
13 remunerated for every airing of their  
14 work; such royalties on art sales is a  
15 simple matter long overdue."

16           On the other hand, Jules Olitski  
17 has said, "Who stands to benefit?  
18 For the most part, artists who are least  
19 in need of more money than they already  
20 have.

21           In my opinion, the resale  
22 provision will prohibit rather than  
23 encourage the purchase of works of art,  
24 thereby making life, if anything, more  
25 difficult for those artists most in need."

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2           Jules Olitski's view is shared  
3 by Wolf Kahn who wrote: "The instances  
4 when the work of unknown artists is resold  
5 at a substantial increase in value are  
6 very rare. Usually it's the early work of  
7 a very established artist which sells at a  
8 higher price than the original purchase  
9 price."

10           Both Jules Olitski and Wolf Kahn  
11 expressed concern for the adventurous  
12 collector who may lose money on art  
13 acquired and later sold.

14           To this argument, member Rolland  
15 Golden responded and wrote: "To  
16 those who say what if it is sold at a  
17 loss, I say art should not be considered  
18 solely on an investment-business level,  
19 but as a pleasure and the enrichment of  
20 our lives. Unfortunately, those of us who  
21 paint must earn money to continue, and  
22 must be ever mindful of business matters,  
23 at least on some level."

24           Sarah Kuniyoshi, widow of Yasuo  
25 Kuniyoshi, is in favor of a resale

1  
2 royalty law so long as "the seller does  
3 not suffer a loss in the  
4 transaction."

5 VAGA's President, the artist  
6 Richard Anuszkiewicz, favors a new law  
7 because an artist's continuing effort  
8 causes the value to increase. He writes:  
9 "Many artists in this country work  
10 for years and years and are forced to sell  
11 their art for a pittance in order to  
12 survive and to continue to create their  
13 work. The increased value of the art they  
14 sold for literally pennies, is due, in  
15 large part for the artists' continued  
16 persistence to produce work under adverse  
17 conditions."

18 Stuart Davis's son Earl Davis  
19 deals with the question much as does  
20 Richard Anuszkiewicz. He says, "As  
21 in my father's case, he suffered  
22 tremendously throughout his life from  
23 often desperate poverty. I believe,  
24 therefore, that it is only fair and right  
25 for our society to allow the artist or the

1  
2 survivors to share in the future financial  
3 rewards of something that  
4 they created."

5           The question of moral rights and  
6 its relationship to resale rights was  
7 important to Louise Bourgeois. She wrote,  
8 "The question of resale royalty is  
9 very much connected to my beliefs about  
10 artists' rights as reflected in this new  
11 moral rights law. An artist is always  
12 morally connected to his work, and the  
13 future value of a work is absolutely a  
14 reflection of the artists' reputation and  
15 his continuing relationship to that art.  
16 A resale royalty would recognize this  
17 connection."

18           Fritz Eichenberg's widow,  
19 Antonie Eichenberg echoes Ms. Bourgeois'  
20 sentiments when she writes, "In my  
21 late husband's case since he produced  
22 during his long life a huge body of work,  
23 spent many years of developing his unique  
24 style and good reputation, it seems long  
25 overdue to lawfully guarantee sharing the

1  
2 profits of resales, since prices increase  
3 after an artist's death."

4               So too, Robert Rentzer,  
5 representing the Estate of Morris  
6 Hirschfield, writes, "As the United  
7 States moves closer to the European model  
8 of recognizing the moral rights of  
9 artists, it is fitting that we recognize  
10 their contribution to  
11 society."

12               Some of our members were  
13 concerned about practical issues. Tom  
14 Wesselmann writes, "I am already  
15 appalled at the paperwork complexity that  
16 runs through our society and I don't think  
17 we should add to it. Life is complex  
18 enough now, so I'm indifferent to the  
19 proposal for artists' resale  
20 rights."

21               Cleve Gray expresses Tom's  
22 sentiment when he writes, "I am very  
23 opposed to the resale royalty idea. It  
24 makes far too complicated the question of  
25 sales."

1

2           On the other hand, Peter Grosz,  
3   executor of the art of his father, George  
4   Grosz, says, "The implementation is  
5   difficult, but I think a workable solution  
6   can and should be found."

7           George Rickey, while in favor of  
8   the proposed laws, is "grateful  
9   that his room and board do not depend on  
10   the collection of resale royalties." He  
11   thinks that the "law would be hard to  
12   enforce" and goes on to say, "Do  
13   the auction houses conform? Would they?  
14   How will the artist learn of a resale? I  
15   usually do not. Included in the  
16   legislation should be a clause that the  
17   artist learn what the sales price of a  
18   work of his really was. He is sometimes  
19   the last to learn."

20           Member June Wayne, who has  
21   studied the question at length,  
22   particularly from the identification and  
23   recordation of sold works, is in favor of  
24   a new law. She writes, "The issue  
25   of residual rights for artists is one I



1  
2 have long mulled about. It is worth  
3 pursuing but its design must be made  
4 robust enough to plug the leaks that the  
5 travel of artworks produce."

6 I spoke with VAGA member Jim  
7 Rosenquist the other day. I know he  
8 will be offering his views on resale  
9 royalty here later in the day, and I'm  
10 certainly looking forward to that.

11 I have read you some of the  
12 views of our members; they all have  
13 different opinions. Speaking for the  
14 majority, we suggest that a resale royalty  
15 is appropriate. Specifically, we suggest  
16 the following:

17 (a) a resale royalty law applying  
18 to sales by auction houses. It is  
19 believed that including "dealers" within  
20 the law would be extremely difficult both  
21 definitionally and from the standpoint of  
22 enforcement. There are so many different  
23 levels of sale in the United States that  
24 effective enforcement would be exceedingly  
25 difficult, if not impossible. There is

1  
2 not one art market in America. There are  
3 a multitude of markets, with disparate  
4 businesses, who think or do not think  
5 themselves to be dealers. On the other  
6 hand, auction houses are licensed by the  
7 government; they are discernible; the art  
8 they sell is known, as is the price at  
9 which it is sold.

10 To commence resale royalties  
11 with auction houses will give the  
12 collecting mechanism an opportunity to  
13 mature. Later, perhaps five years after  
14 the law is enacted, its expansion can be  
15 reviewed. It must be noted that in  
16 practice the French droit de suite has  
17 been applied only to the auction houses.  
18 Apparently, this limitation has not  
19 adversely affected auction house sales as  
20 compared to gallery sales. So too, as far  
21 as we know, auction sales have not  
22 transferred from France to the United  
23 Kingdom, which as of this date does not  
24 have a resale royalty law.

25 (b) The royalty should also be

1  
2 based on a flat percentage of the sales  
3 price. To have it only on gains would be  
4 extremely cumbersome and require  
5 investigations that will be strongly  
6 resisted.

7 (c) The law should require the  
8 auction house to retain the resale royalty  
9 in a trust account and to pay it over to  
10 the artist or to the collecting agency,  
11 such as VAGA or ARS, appointed by the  
12 artist to collect on his behalf.

13 (d) The period of coverage  
14 should be 50 years beyond the death of the  
15 artist whose work is resold. In that way,  
16 estates could benefit from the expanded  
17 popularity of the artist's work. If there  
18 is no one to claim the right for a  
19 particular work, the proceeds should be  
20 segregated after a period of time for  
21 appropriate disbursement to artists who  
22 need the funds in order to do their work.

23 As mentioned in the beginning of  
24 this statement, resale royalties is one of  
25 a number of important issues facing visual

1  
2 artists and is indeed a highly visible  
3 issue. Our members are interested in  
4 other problems which likewise call for  
5 Copyright Office review. For example,  
6 VAGA member Sabra Field wrote, "The  
7 opportunity to receive a royalty on resale  
8 seems nice, but also impossible to  
9 enforce. My concerns as a  
10 printmaker/designer fall more toward  
11 control of unauthorized reproduction.  
12 Wouldn't it be nice if we could protect  
13 the work of past artists now in what I  
14 guess is the 'common domain' from being so  
15 ruthlessly ripped off."

16 VAGA suggests, and indeed urges  
17 the Copyright Office to pursue, with  
18 hearings such as the one today, the  
19 question of the retroactive abolition of  
20 the copyright notice requirement.

21 We have done extensive legal  
22 research into this question, and have  
23 written a law review article clearly  
24 demonstrating that it can be accomplished  
25 within constitutional restraints. If this

1  
2 were to be accomplished, then perhaps the  
3 last serious vestige of our system which  
4 has been so at odds with the copyright  
5 laws of the rest of the world, will be  
6 abolished.

7               We all agree that art is crucial  
8 to the well-being of a modern society.  
9 Without it, we would indeed be  
10 impoverished. When a young person says, I  
11 want to be a doctor, or a mechanic, or a  
12 salesman, we know there is a strong  
13 likelihood that if he does choose one of  
14 those professions he can make a living.  
15 Yet if he chooses to be an artist, it is  
16 very unlikely that he can make a living.

17               Somewhere along the line the  
18 system has failed. While we recognize the  
19 importance of art, our present market  
20 economy denies all but a few artists the  
21 chance to earn a livelihood. What is  
22 needed is a change in the system to better  
23 reward an artist without making it a  
24 handout. Collecting royalties for  
25 reproduction rights is a start, but it is

1  
2 not enough, because so much American art  
3 is in the public domain and there is not  
4 enough of a reproduction market to affect  
5 many artists. This is one reason why a  
6 retroactive abolition of the requirement  
7 of a copyright notice is now needed. A  
8 resale royalty will be another step toward  
9 rewarding the artist for his dedication  
10 and obvious sacrifices. This reward will  
11 be a reflection of the efforts of the  
12 artist to keep active and continue to  
13 create and it will allow artists  
14 finally to be treated on the same basis as  
15 other authors, particularly in the music  
16 and literary industries.

17 Again, we congratulate you on  
18 the thoroughness of these hearings, and on  
19 behalf of VAGA and its members we offer to  
20 help you in any way we can.

21 Thank you.

22 (Discussion held off the  
23 record.)

24 MR. OMAN: We will take a break,  
25 we have some administrative matters to



1  
2 take care of.

3 (Recess taken.)

4 MR. OMAN: If the witnesses  
5 could resume their positions at the table  
6 we could continue the hearing.

7 MR. PANZER: Excuse me.

8 MR. OMAN: Gentlemen, we have a  
9 few questions. We are going to try to  
10 break at 1:00 o'clock, so we want to move  
11 along.

12 Mr. Panzer, you raised the  
13 question of the retroactive elimination of  
14 the notice requirement. I just want to  
15 make sure I understand the point you are  
16 making.

17 Under the old law, prior to  
18 1976, works of fine art generally did not  
19 require notice if they were unpublished,  
20 and most paintings were considered  
21 unpublished. Of course, if you had a  
22 postcard made or an illustration for a  
23 book made from that painting, that did  
24 require notice.

25 Subsequent to

1  
2 the new law in 1978, failure to provide  
3 notice may be corrected. Later in connection  
4 with U.S. adherence to the Berne Convention,  
5 U.S. law was amended so that the notice  
6 requirement is no longer in place.

7 What would you gain from a  
8 retroactive elimination of the notice  
9 requirement?

10 MR. PANZER: What has happened  
11 over the years is that very few artists  
12 knew about the requirement of copyright  
13 notice on their art, or on the  
14 reproductions, or if they knew they were  
15 ignorant about how to enforce it, or they  
16 did not want to enforce it because it goes  
17 against the very nature of what they do,  
18 it commercializes their art.

19 MR. OMAN: You want to recapture  
20 works that have fallen into  
21 the public domain because of  
22 failure to affix notice?

23 MR. PANZER: That's right, but  
24 only for future reproductions, not for  
25 reproductions that took place already,

1  
2 that would be unfair and unenforceable.  
3 It would be in those cases, of any new  
4 reproduction of a creation that has  
5 fallen into the public domain because of  
6 the failure to affix the copyright notice.

7 A great deal of art falls  
8 into that category; the large  
9 majority of the art that is reproduced  
10 falls into that category. It is not  
11 even a matter of money; it's a matter of  
12 control. Artists are not able to control  
13 how their art is reproduced.

14 MR. OMAN: I understand.

15 Thank you very much for that  
16 clarification.

17 I also want to reassure you that  
18 the responses of your 400 artist members  
19 will be included as part of the record.

20 MR. PANZER: Thank you.

21 MR. OMAN: I have a question for  
22 both of you, and the question is, what  
23 impact do you think the American antitrust  
24 laws would have on your efforts to collect  
25 under a federal droit de suite, if one were adopted?

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12                   MR. FEDER: I wanted to add  
13 something to the previous answer;  
14 we are dealing not only with U.S.  
15 artists. It is true that most U.S.  
16 artists had no idea in the old days  
17 that in order to safeguard their work they  
18 would have to append a copyright notice to  
19 the work and/or register it with the  
20 Copyright Office, it just wasn't something  
21 artists were aware of. Certainly,  
22 very very few artists did that.

23                   We could debate whether or not  
24 they placed themselves voluntarily in a  
25 situation where they deserved to be

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2 deprived of the right, which is so often  
3 the case, tragically.

4

But dealing with the European  
5 art, a European artist's work, under the  
6 laws of his country, be it France,  
7 Germany, and most other European  
8 countries, and under the Berne Convention,  
9 are automatically copyrighted at the  
10 instant of its creation, it requires no  
11 registration, no notice.

12

I just wanted to add to the  
13 previous question, I am not an expert in  
14 antitrust law, but it seems to me  
15 that the functioning of the rights  
16 society on behalf of artists in collecting

17

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2 and distributing the droit de suite would  
3 not be that different from the way that  
4 ASCAP and other societies collect and  
5 disburse funds to their members.

6 MR. OMAN: Of course they have  
7 had problems under the antitrust laws, and  
8 they are operating under a consent  
9 decree to collect, at least ASCAP is.

10 MR. FEDER: I don't want to be  
11 facetious, but I guess it's one of the  
12 problems we would be happy to have because  
13 it would mean that the droit de suite had  
14 been attempted and accepted.

15 I would want to add that we  
16 would do whatever we could under the  
17 evolving U.S. law. And, as I said, I am  
18 not an expert in antitrust law, but it  
19 seems to me it would not be all that  
20 difficult to work out some kind of  
21 conceptual agreement with the Antitrust  
22 Office of the Treasury Department so that  
23 we function in accordance with what those  
24 laws mandate.

25 MR. OMAN: I wonder how long



1  
2 CISAC has had authority in this area. Is  
3 this something that dates back to its  
4 origin in 1920, because CISAC,  
5 technically, is concerned with the  
6 creation of music. And I wonder when they  
7 got into this sideline.

8 MR. FEDER: Yes. I think  
9 there's an unfortunate similarity of the  
10 names. I'm talking about CISAC, which is  
11 an international authors, composers, and  
12 artists rights society as opposed to the  
13 domestic CISAC, which is a music  
14 collecting society.

15 MR. OMAN: I am aware of the  
16 distinction you are making, I know the two  
17 organizations; but CISAC is limited to  
18 authors and composers.

19 MR. FEDER: No. The CISAC of  
20 which I am speaking --

21 MR. OMAN: I am just translating  
22 the name. The literal translation of the  
23 name is authors and composers.

24 MR. FEDER: Yes.

25 And if I may add to that, and

1  
2 that is, that it's quite common in Europe,  
3 in fact it's more often the case than not,  
4 that artists never are included within the  
5 words "author's rights." If you ask what  
6 is the nature of your society, they will  
7 tell you that ours is an author's right  
8 society. Artists are subsumed within the  
9 term "authors" in the European context.

10 MR. OMAN: Fine.

11 So, my question still remains,  
12 did they have jurisdiction over the  
13 promulgation of artists' rights in 1920?

14 MR. FEDER: Absolutely. I don't  
15 know whether it dates back to 1920; but in  
16 my dealing with the organization, they do.  
17 It's of long-standing, but I cannot  
18 tell you precisely if it began in 1920  
19 or whether it occurred, let's  
20 say, ten years later.

21 MR. OMAN: Would you like to  
22 answer the antitrust question, Mr.  
23 Panzer?

24 MR. PANZER: Basically, I am  
25 also not an attorney and there's really

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7 not much more to add. I mean, Ted pretty  
8 much said how I feel also.

9

MR. OMAN: Thank you, gentlemen,  
10 very much. We will be back in touch. We  
11 appreciate your contribution.

12

MR. FEDER: I didn't mean to  
13 imply that the difference of the two  
14 organizations was not clear to the chair.  
15 I am certain they were.

16

MR. OMAN: The point is well  
17 taken, but there are perhaps others in the  
18 room who would be confused by the similarity  
19 and the sound of the names.

20

The last panel before lunch will  
21 be the Volunteer Lawyers for the Arts  
22 represented by Mr. Dan Mayer, and the New  
23 York Artists Equity represented by Jeffrey  
24 Homan.

25

Gentlemen, you have the floor.

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2 Will you please identify  
3 yourselves for the record?

4 MR. HOMAN: I am Jeffrey Homan.

5 MR. MAYER: I am Daniel Mayer.

6 Thank you for this opportunity  
7 to testify on behalf of the 8,000  
8 individual artists, arts administrators  
9 and attorneys who each year utilize the  
10 resources of Volunteer Lawyers for the  
11 Arts. For 22 years Volunteer Lawyers for  
12 the Arts has offered free legal  
13 representation, advice, and education to  
14 low-income individual artists and art  
15 organizations in all creative  
16 disciplines.

17 In 1969 a group of young lawyers  
18 founded Volunteer Lawyers for the Arts  
19 because they saw that most artists are  
20 unable to afford legal counsel. Although  
21 individual artists contribute immeasurably  
22 to the cultural life of our country,  
23 rarely are their contributions rewarded  
24 economically. According to a recent study  
25 commissioned by the New York Foundation

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2 for the Arts and the Research Center for  
3 Arts and Culture at Columbia University,  
4 61 percent of the artists surveyed had an  
5 annual income under \$15,000. Only 14  
6 percent of the visual artists surveyed  
7 were able to support themselves entirely  
8 from their artwork.

9           The economic plight of visual  
10 artists is empirically known to most  
11 people who work in the arts community.  
12 Volunteer Lawyers for the Arts supports  
13 the enactment of legislation which will  
14 provide visual artists with royalties  
15 generated by the resale of their work.

16           Resale royalties are intended to  
17 provide an economic benefit for visual  
18 artists analogous to the royalty rights  
19 currently enjoyed by composers. We  
20 believe that the adoption of a national  
21 resale royalty policy would encourage the  
22 creation of new works of art by  
23 recognizing that visual artists, like  
24 writers and composers, have an ongoing  
25 relationship with the fruits of their

1  
2 creativity and should share in the  
3 proceeds these works generate.

4           The economic plight of artists  
5 is not the only rationale for Volunteer  
6 Lawyers for the Arts' support of resale  
7 royalties. The Visual Artists Rights Act  
8 of 1990 recognizes artists' continuing  
9 interest in their artwork. But this  
10 legislation stopped short of achieving its  
11 goal and did not recognize an artist's  
12 right to be compensated for subsequent  
13 sales of art that they have created. The  
14 result of this omission in the Visual  
15 Artists Rights Act is an inequitable  
16 system that does not fully acknowledge the  
17 copyright of visual artists.

18           We urge that resale royalty  
19 legislation be modeled on the French droit  
20 de suite, which assesses a percentage of  
21 the total gross price of each sale  
22 regardless of whether the work has  
23 increased in value since its last sale.  
24 Specifically, we support a resale royalty  
25 rate of five percent of gross resale



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2 proceeds. This percentage would  
3 adequately protect the economic rights of  
4 artists, without unduly affecting the art  
5 market.

6           The resale royalty right should  
7 apply to all original works of visual art  
8 which are afforded moral rights protection  
9 under the Visual Artists Rights Act of  
10 1990. The only limitation is that the  
11 price of the works should surpass a  
12 threshold resale price of \$750. The right  
13 should cover visual artists who are either  
14 citizens or residents of the United States  
15 whose works are either sold in the United  
16 States, or sold outside of the United  
17 States by a seller who either resides in  
18 or is domiciled in the United States.

19           For ease of administration and  
20 uniformity, Volunteer Lawyers for the Arts  
21 believes it would be fair for the duration  
22 of the resale royalty right to be  
23 coextensive with the copyright in the  
24 work. In other words, the resale royalty  
25 right should last for the life of the

1  
2 author and 50 years after the author's  
3 death. The right should be descendible in  
4 a manner analogous to copyrights.

5           We endorse the establishment of  
6 private artists' rights societies as  
7 essential to monitor and implement the  
8 collection of resale royalties. These  
9 societies would play the same important  
10 role in the visual arts that ASCAP  
11 and BMI play in the music world. The  
12 French droit de suite law is generally  
13 regarded as successful, in part, because  
14 of the existence of the central private  
15 organizations, such as those testifying  
16 here today. Artists would be empowered by  
17 the existence of strong central  
18 organizations which would serve as a  
19 collective voice for those who,  
20 individually might not be heard.

21           To enable the private artists'  
22 rights societies to monitor sales of works  
23 of art effectively, we urge that the  
24 legislation contain a mandatory disclosure  
25 provision. The seller's failure to

1

2 disclose sales information should be  
3 subject to a penalty. Laws which do not  
4 contain a disclosure obligation generally  
5 have not been successful.

6

Volunteer Lawyers for the Arts  
7 asserts that the resale royalty right can  
8 and should be applied retroactively to  
9 works in existence at the date of  
10 enactment of legislation. Such a  
11 retroactive application would not  
12 unconstitutionally impair contracts or  
13 violate due process. Moreover, the public  
14 interest would be served by retroactive  
15 legislation which improves the welfare of  
16 artists who have already created works of  
17 art. Also, given the volatility of the  
18 art market and the fact that art is  
19 generally purchased for aesthetic  
20 qualities as well as for investment, it is  
21 unlikely that the retroactive application  
22 of resale royalties would substantially  
23 disrupt the art market trade. Retroactive  
24 application of the legislation would be  
25 consistent with the legislation's goal, to

1  
2 encourage and support artistic endeavors  
3 as a vital part of American culture.

4           Resale royalties will not hurt  
5 the American art market. The art market  
6 is already accustomed to incurring certain  
7 charges on the sale of artwork, for  
8 example, the commission from consignors and  
9 buyer's premiums to auction houses.  
10 Moreover, a substantial number of  
11 collectors purchase art for more than  
12 anticipated economic gain; many enjoy the  
13 aesthetics of the artwork and wish to  
14 encourage the creation of new art.  
15 Volunteer Lawyers for the Arts believes  
16 that the American art market could easily  
17 accommodate a modest resale royalty for  
18 the benefit of artists.

19           The risk of sellers fleeing the  
20 American art market is greatly minimized  
21 by the increasing global recognition of  
22 resale royalties. Currently 28  
23 jurisdictions, including many of the  
24 largest art markets in the world have  
25 recognized resale royalties. A complete

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2 discussion of the acceptance of resale  
3 royalties internationally is found in The  
4 Droit De Suite in Literary and Artistic  
5 Property: A Comparative Law Study by  
6 Liliane de Pierredon-Fawcett available at  
7 the Center for Law and the Arts of  
8 Columbia University School of Law.

9

          The European Community has  
10 replaced resale royalty legislation on its  
11 agenda and is likely to put increasing  
12 pressure on the United Kingdom and other  
13 non-resale royalty rights countries to  
14 conform and recognize these rights.  
15 Volunteer Lawyers for the Arts believes  
16 that the United States' recognition of  
17 resale royalties rights is appropriate and  
18 that such recognition will support current  
19 collaborative European efforts.

20

          There is an international  
21 movement towards recognition of droit de  
22 suite for visual artists. The United  
23 States has an opportunity to take a  
24 leadership role in investigating all of  
25 the ways that resale royalties have been

1  
2 implemented, and creating a dialogue with  
3 how royalties may be recognized as part of  
4 the copyright law of this country. We  
5 applaud your efforts in beginning this  
6 important dialogue.

7 MR. OMAN: Thank you very much,  
8 Mr. Mayer.

9 I understand you are the newly  
10 appointed head of the Volunteer Lawyers  
11 for New York.

12 MR. MAYER: That's correct.

13 MR. OMAN: How long?

14 MR. MAYER: Very newly, two weeks.

15 However, when the written comments were submitted  
16 by Volunteer Lawyers for the Arts last June, I was  
17 the Director of Lawyers for the Creative Arts in  
18 Chicago, which along with six other volunteers also  
19 endorsed these comments.

20 MR. OMAN: It is good to have that  
21 breadth in the record. It's wonderful to have you  
22 here. Now we

23 Now we turn to Mr. Homan representing  
24 the New York Artists Equity.

25 Mr. Homan



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MR. HOMAN: Thank you.

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I want to preface these comments by saying that these points were approved by the Board of New York Artists Equity and created with the assistance of our counsel.

In view of the precedent set in California, New York Artists Equity Association, Inc. endorses the idea of federal resale royalty legislation as long as application of such a statute could be effected in a timely and practical manner.

To that end, we make the following suggestions for your consideration:

(1) Implementation of the federal law would involve the establishment of a national registry to be administered by the Register of Copyrights. In this scenario, the registration of artwork would be part of the copyright procedure. At the time of copyrighting, the work would be given a registration number. The registration of

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2 artwork would be the responsibility of the  
3 artist and underwritten by the artist in  
4 the form of a fee.

5

(2) At the time of registration,  
6 a registration document will be given to  
7 the artist. At the time of sale this  
8 document would be transferred to the  
9 buyer. Possession of this document would  
10 indicate clear title to the work by any  
11 subsequent reseller.

12

(3) The five percent resale  
13 royalty would be paid by the reseller to  
14 the Register of Copyrights, not directly  
15 to the artist. The Copyright Office would  
16 in turn disburse monies to the artist. It  
17 would be the responsibility of the artist  
18 to keep the Register of Copyrights  
19 informed of his or her whereabouts.

20

(4) The law would only apply to  
21 major works selling for a substantial  
22 amount, perhaps over \$5,000. This would  
23 eliminate a huge number of transactions  
24 that would ensue were the law applied  
25 equally to the resale of all works of art,

1

2 i.e., printed editions, et cetera.

3

4 (5) The resale royalty would be  
5 paid to the living artist and the artist's  
6 heirs for a stated term not to exceed 75  
7 years after the death of the artist.

8

9 (6) Resale royalty rights on  
10 artwork would be nonassignable and  
11 nontransferable to third parties by the  
12 artist or the artist's heirs.

13

14 Thank you very much.

15

16 MR. OMAN: That's a very  
17 provocative proposal and one that we will  
18 look forward to studying in detail, and  
19 perhaps consulting with you in the weeks  
20 ahead. You raised a number of  
21 interesting points, and it's  
22 appropriate that they are brought up in  
23 the context of this discussion of the  
24 droit de suite because they do touch on  
25 the same questions concerning artists'  
prosperity and the continued incomes  
generated by their work over the years.

26

27 Mr. Patry, do you have any  
28 questions you'd like to ask?

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2

MR. PATRY:

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Mr. Homan, in making your suggestions did you consider how they would impact on our obligations under the Berne Convention?

7

MR. HOMAN: Pardon me.

8

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12

MR. PATRY: Did you look at the Berne Convention that the United States is a member of and figure out whether your suggestions would be consistent with our obligations?

13

14

MR. HOMAN: I'm sorry, I am not familiar with that.

15

16

17

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MR. PATRY: If I understand your proposal correctly, you would not be able to get droit de suite unless you register something with the Copyright Office.

19

MR. HOMAN: Yes.

20

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23

MR. PATRY: If someone didn't register with the Copyright Office, no right at all?

24

25

MR. HOMAN: I would say that it would be a practical problem. My concern

1  
2 here is that the purchase and resale of  
3 art and any profit due the artist be  
4 something that could be administered  
5 easily.

6 One comment that was made  
7 earlier about the deluge of paper in our  
8 society I think is relevant here, and that  
9 is why I am suggesting a central data bank  
10 for this information.

11 MR. PATRY: Maybe it's manna  
12 from heaven for people in Washington to  
13 hear that you have more faith in the  
14 government, a bureaucracy to do it, than  
15 perhaps a private collection society.

16 My other question is about your  
17 distinction with major works. Your  
18 distinction would be purely based on  
19 price, not on worth or quality; is that  
20 correct?

21 MR. HOMAN: Since this is a  
22 monetary consideration, I think that would  
23 be appropriate, yes.

24 MR. PATRY:

25 Thank you very much.

1

2                   MR. OMAN: A related question.

3   We have discussed on several occasions  
4   within the Copyright Office the  
5   possibility of maintaining a registry for  
6   limited edition works, an artist makes 500  
7   copies and numbers each of them, signs  
8   each of them, and sometimes the plates  
9   fall into the hands of an unscrupulous  
10   heir or an unscrupulous dealer who makes  
11   not just the 500 copies, but an additional  
12   thousand copies because they need the  
13   money.

14                   If a central registry were instituted  
15   in the Copyright Office, for instance, with each  
16   copy of a limited edition documented -- the  
17   chain of title following carefully in each  
18   case -- would that protect not only the  
19   original artist's intentions and his  
20   particular creativity but also  
21   protect the investors, the people who buy  
22   the work and pay a premium price because  
23   it is one of 500?

24                   MR. HOMAN: It would seem so,  
25   right. I think this could be invaluable



1  
2 also because of the fact that artists very  
3 often don't know where their works are. I  
4 can vouch for that, three-quarters of my  
5 work I probably have no idea where it is  
6 right now. It is therefore very difficult to  
7 determine whether or not it has been resold.  
8 I think that this registry could cut  
9 both ways; it could help in both  
10 directions.

11 MR. OMAN: One point I want  
12 to make, and in many ways it's an  
13 admission against interest by the Register  
14 of Copyrights, you do not have to register  
15 work to get copyright protection.  
16 Copyright exists from the moment of  
17 creation, and we just function as an  
18 agency of record for the recordation of  
19 the copyright certificates; but we don't  
20 grant copyrights in Washington.  
21 Artists have that as a matter of law  
22 without us doing anything.

23 Are there any further  
24 questions?

25 MR. PATRY: Just one.

1  
2           There was testimony earlier  
3 about copyright notice and how a lot of  
4 artists lose protection for failure to put  
5 a notice on, which I think is probably  
6 true. So, I am curious why you might  
7 think that artists would be anymore likely  
8 to be aware that they had to register  
9 something with the Copyright Office in  
10 order to get a resale royalty.

11           MR. HOMAN: I think this is a  
12 very big problem. Certainly there needs  
13 to be a real consciousness-raising effort  
14 on the part of the art establishment in  
15 this country, universities, galleries,  
16 museums alike, to make this possible.

17           MR. OMAN: Traditionally artists  
18 have not been organization people, but I  
19 think that is changing. We have two  
20 organizations representing them today, so  
21 maybe that will increase the educational  
22 process and make artists more careful about  
23 protecting their rights in the future. At  
24 least we hope so.

25           MR. PATRY: And I wanted to

1

2 compliment Mr. Mayer on the excellent  
3 submission that was given to us earlier.

4

5 MR. MAYER: Thank you.

6 MR. OMAN: Thank all of you.

7 (Panel was excused.)

8 MR. OMAN: The hearing will

9 stand in recess. We will

10 reconvene at 2:00

11 o'clock sharp.

12 We thank the last panel for

13 its testimony.

14 (Luncheon recess taken.)

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2        A F T E R N O O N       S E S S I O N

3                MR. OMAN: Our first panel this  
4 afternoon includes Mr. George Koch of  
5 National Artists Equity and James  
6 Rosenquist and Sanford Hirsch, well-known  
7 artists.

8                We welcome you to the hearing.  
9 I ask you to identify yourselves and  
10 decide among yourselves who wants to go  
11 first.

12               MR. ROSENQUIST: I am James  
13 Rosenquist.

14               How do you do?

15               I have a statement I would like  
16 to give you. Should I do that now or are  
17 we going to introduce the other  
18 gentlemen?

19               MR. OMAN: They can introduce  
20 themselves as they are ready to proceed.

21               MR. ROSENQUIST: All right.

22               Statesman, Lawmakers, Artists  
23 and Friends, my name is James Rosenquist.  
24 I am an artist/painter. I have been  
25 painting and selling my work for 31 years

1

2 and I have had twelve retrospective  
3 exhibitions, the last two in Moscow and in  
4 Spain.

5 In 1971 I suffered an automobile  
6 crash from a hit-and-run driver which  
7 crippled my wife and son and put me  
8 immediately in debt for \$61,000. I was in  
9 mid-career, and it took a few years to get  
10 back to making paintings again. Art  
11 collectors visited my studios. They  
12 looked at my paintings, said they were  
13 wonderful and marvelous, then walked out  
14 and went to the art auction that night and  
15 bought a work that I had originally sold  
16 for \$750 for \$45,000. This situation  
17 continued and irked me because I was in  
18 dire hardship. Several years later I  
19 lobbied at the doorways of the Senate with  
20 Marion Javits and Bob Rauschenberg for an  
21 artists' royalty bill. Through our  
22 Javits/Brademis/Koch amendment we added  
23 the names of Hubert Humphrey and Senator  
24 Magnuson from Washington. Our amendment  
25 to a welfare bill passed the Senate but

1  
2 failed the House. The law consisted of  
3 the 15 percent royalty on the monies after  
4 \$1,000 was achieved beyond the original  
5 purchase price and only if the painting  
6 went up in value. Later on, Senator Alan  
7 Sieroty of California rewrote the bill with a five  
8 percent royalty, and I believe that was to be  
9 collected whether the painting went up or  
10 down in value.

11 About four years ago I got a  
12 call from a lawyer in San Francisco. He  
13 said the state had a check for me for \$750  
14 for a resale. At the time I was talking  
15 to Senator Ted Kennedy. He said, "Jim,  
16 don't cash the check, come down to  
17 Washington and show it at a press  
18 conference," which I did.

19 In my 31 year career the highest  
20 frequency of resale has been maybe four  
21 times per picture. Sometimes only once.  
22 One resold for \$2,090,000 of which I did  
23 not get a penny on the resale. The 1980's  
24 were notorious for immediate secondary  
25 sales of young artists. Get the picture



1  
2 away from the artist and speculate with  
3 it, was a general idea. Paintings were  
4 bought in bulk for low prices and  
5 auctioned off within a year or two.

6 The Art Dealers Association has  
7 an attitude about art like the Goose that  
8 Laid the Golden Egg: Save the egg but  
9 kill the goose.

10 I know many artists who are  
11 middle age and are in mid-career, who are  
12 having a very difficult time;  
13 they are quite brilliant people.

14 In 1978 I got a call from Joan  
15 Mondale. She asked me if I would accept  
16 an appointment from Jimmy Carter to serve  
17 on the Council for the National Endowment  
18 for the Arts, which I did for five years.  
19 Our job was to try to inform senators and  
20 congressmen what good an artist was, which  
21 we were asked quite often. My statement  
22 was that an artist provides an abstract  
23 mental garden for other people to think,  
24 live, work, and exist in. Having artists  
25 and art around enhances the quality of

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2 life and is the opposite of war. Artists  
3 are a national treasure and are rare  
4 because, much to my surprise, out of the  
5 30 aspiring artists assistants I have had  
6 over the past 30 years maybe one or two  
7 will become an artist.

8

When Ronald Reagan became  
9 President, he thought everything should be  
10 funded by the private sector, which isn't  
11 a bad idea, except the private sector is  
12 ultra conservative as is our nation  
13 today. Therefore, we sorely need the NEA  
14 to fund the avant-garde, and we sorely need  
15 other support.

16

Don't confuse art and commercial  
17 art. An artist isn't thinking of the  
18 money when he or she paints. The idea  
19 they have is priceless to them, but  
20 someone else comes along and puts a price  
21 on it. The artist may think that price is  
22 low, but the artist may have some comfort  
23 with the royalty law knowing that their  
24 priceless work they sold at a low price  
25 may help their heirs in the future.

1  
2 I want to make it clear I'm for  
3 a 15 percent royalty law, but not a  
4 retroactive law. If I receive a royalty  
5 of 15 percent on the resale of my work, I  
6 would gladly give one-half to start an  
7 artists' fund to help struggling artists  
8 in America. The Krasner-Pollock  
9 Foundation, the Gottlieb Foundation, and  
10 the Andy Warhol Foundation are directed by  
11 people other than the original artists.  
12 It would be good to have the living  
13 artist's input into the direction of the  
14 foundation because, as we all know, who  
15 else can tell who is an artist but another  
16 artist.

17 Thank you very much.

18 MR. OMAN: Thank you very much,  
19 Mr. Rosenquist.

20 You touched on several items in  
21 your testimony, specifically the  
22 National Endowment for the Arts  
23 issues, that are beyond the scope of our  
24 hearing today; but they  
25 are still important, and I am glad you did

1  
2 mention them.

3                   We do have  
4 questions for you, but they will wait  
5 until the completion of the panel. The  
6 next witness will be?

7                   MR. HIRSCH: Sanford Hirsch.

8                   MR. OMAN: Yes, sir.

9                   MR. HIRSCH: I'm a visual artist  
10 as well as the Executive Director of the  
11 Adolph & Esther Gottlieb Foundation, which  
12 Mr. Rosenquist just mentioned, a  
13 not-for-profit corporation that  
14 administers two grant programs  
15 specifically intended for mature painters,  
16 sculptors, and printmakers. We were  
17 established out of the estate of Adolph  
18 Gottlieb specifically to make grants to  
19 artists, mature artists, older artists who  
20 are in current financial need.

21                   We raise all our funding through  
22 the sales of paintings that Mr. Gottlieb  
23 left to us, so I know both about the  
24 market for art and the need among artists,  
25 and that is what I want to speak about.

1  
2                   Despite the impression of many  
3   in the popular press, the overwhelming  
4   majority of visual artists are not  
5   wealthy. Most earn a meager living from  
6   their artistic endeavors and must  
7   supplement that income with some other  
8   form of employment. Those who are  
9   fortunate can find teaching jobs. Many  
10   artists work in the service economy, in  
11   fields of endeavor such as construction  
12   trades or various types of freelance work  
13   that offer little stability and no  
14   benefits. Among those artists who are  
15   fortunate enough to earn a living through  
16   the sale of their art, the reality is that  
17   the art market is unmercifully fickle,  
18   providing some with fame and a comfortable  
19   income for a very short period, and  
20   leaving those same people without support  
21   or entrance into a market when their work  
22   is out of fashion. The one economic rule  
23   he or she knows is that there are no  
24   guarantees, and the artist's ability to  
25   affect his or her market is virtually nil,

1  
2 which, again, Mr. Rosenquist just  
3 mentioned in a very personal way.

4               Since fashion is a major  
5 determinant of art markets, there are  
6 numerous artists who created work during  
7 one period, which has a viable resale  
8 market, yet there is little or no demand  
9 for current work. It is this artist,  
10 especially, who would benefit from resale  
11 royalties. The interests which would be  
12 served are general, for that artist who  
13 has proven him or herself once is likely  
14 to do so again. Unless, of course, he or  
15 she is denied all encouragement or benefit  
16 from their own creation. To withhold that  
17 encouragement, as is currently the case,  
18 argues against supporting proven talent  
19 and experience.

20               Many of the relationships  
21 between dealers and artists are close,  
22 personal ones, and artists and dealers  
23 often form lifelong friendships. Even so,  
24 artists, as business-people are at  
25 something of a disadvantage. They bear



1  
2 all the costs of development and usually  
3 bear many of the dealer's overhead costs  
4 for items like crating, transportation,  
5 framing, and advertising. When a work of  
6 art sells, the proceeds of that sale today  
7 are usually divided 50/50 between artist  
8 and dealer. This raises two questions:  
9 How are such sales arranged and how do we  
10 perceive of a work of art? An individual  
11 wishing to purchase the work of a given  
12 artist will invariably seek out the dealer  
13 who represents that artist's work. Since  
14 that dealer has sold many of the artist's  
15 works in the past, the dealer knows  
16 exactly where the type of work sought by  
17 the client may be, and knows as well what  
18 the price paid was by the current owner.  
19 Similarly, in the event that a collector  
20 wishes to sell the work of a given artist,  
21 he will seek out the dealer who represents  
22 that artist, as both dealer and collector  
23 know that a prospective buyer is much more  
24 likely to contact an artist's agent than  
25 to go elsewhere.

1

2           Auctions, I want to mention, are  
3 usually perceived as a market of last  
4 resort.

5           In any event, the dealer,  
6 purchaser, and current owner all benefit  
7 from the relationship of exclusivity that  
8 is the norm in the art world. It only  
9 stands to reason that the artist, whose  
10 creation is the basis for these markets,  
11 and who is expected to absorb research and  
12 development costs, should reap some  
13 benefit from his or her efforts.

14           Which brings me to my second  
15 question of how to consider a work of  
16 art. In the current market a work of art  
17 is a simple commodity, nothing more or  
18 less than a telephone or a pair of shoes.  
19 Yet in selling a work of art, a dealer  
20 does not simply fill the walls and floors  
21 with assorted merchandise. The dealer  
22 recognizes, through the means of  
23 displaying works of art in a careful and  
24 considered fashion, and usually organized  
25 along a specific theme, that a work of art

1  
2 is not a mere commodity. Its uniqueness,  
3 its major selling point, if you will, is  
4 that it is an intellectual property. This  
5 quality is also recognized by the  
6 existence of art museums, whose sole  
7 purpose is to allow a broad public to  
8 explore and consider the wealth of ideas  
9 that are the distinguishing properties of  
10 works of art. When considering  
11 the market for works of art, we can look  
12 to other forms of intellectual properties,  
13 rather than commodities, for guidance.  
14 When we do, we see that the notion of  
15 royalties and residuals in the cases of  
16 authors, actors, inventors, musicians, and  
17 composers is the norm. In this analogy,  
18 only visual artists are denied any share  
19 of proceeds from the resale or reuse of  
20 their creations.

21           Since the dealer controls access  
22 to the market, that is, no artist has a  
23 reasonable opportunity to display his or  
24 her works in the art market except at the  
25 invitation of a relatively small number of

1  
2 dealers, fairness would dictate that some  
3 mechanism be established to allow artists  
4 some better ability for stable income.  
5 One means of redressing this imbalance is,  
6 I believe, to allow the artist to benefit  
7 from the resale of works of art he or she  
8 has produced. Among other things, such  
9 increased stability would probably result  
10 in more and better art from artists freed  
11 of some of the anxiety of performing on a  
12 tightrope without a safety net.

13               The second issue is the  
14 feasibility of resale royalties.  
15 Arguments have been made that the amount  
16 of accounting necessary would be too  
17 great, that the concept of allocating some  
18 small part of a purchase too daunting for  
19 a collector, and the problem of keeping  
20 track of artists too difficult to allow  
21 the collection and distribution of resale  
22 royalties. While I have no formal system  
23 to propose at this point, I would again  
24 look to those types of endeavors analogous  
25 to the visual arts. The number of visual

1  
2 artists and the works they produce, not to  
3 mention the number of times any given work  
4 is sold, is far less, and would involve  
5 much less tracking and paperwork, than is  
6 currently utilized to track the number of  
7 times any one song plays every day over  
8 radio stations in every part of the  
9 country. Yet it is possible to pay the  
10 composers and musicians (and paying them  
11 includes being able to find them) for each  
12 time a song plays. A comparable system  
13 exists in order to pay residuals to  
14 actors. I cannot believe that, with some  
15 thought and consideration, an effective  
16 system for the collection and distribution  
17 of resale royalties is an insurmountable  
18 problem.

19           The remaining issue, the  
20 willingness of a purchaser to be bound to  
21 pay such royalties, is more difficult. I  
22 certainly don't know of anyone when  
23 purchasing anything that would volunteer  
24 to pay more. However, we do routinely  
25 assess and distribute costs in order to

1  
2 insure equity and thus keep a market and a  
3 system strong and healthy. Equity, in  
4 this case, calls for a royalty to be paid  
5 to the artist. Since the amount under  
6 discussion is a small percentage of the  
7 purchase price, and since the benefit to  
8 the artist helps ultimately to support the  
9 market for his or her work, I don't think  
10 an informed collector will object. In the  
11 event the rules are the same for all  
12 purchases, as would be the case,  
13 objections would not seriously inhibit the  
14 sale or purchase of works of art.

15           Finally, some have argued that  
16 resale royalties would benefit only those  
17 artists who are already wealthy, and would  
18 inhibit the sales of the works of art of  
19 younger or unsuccessful artists. I doubt  
20 that artists have made such objections. I  
21 would note that the wealth of a Thomas  
22 Edison, mostly gained through royalties  
23 paid on patents, has not inhibited scores  
24 of inventors from attempting to follow in  
25 his footsteps; nor has it reduced



1  
2 investment in research and development.  
3 It does not make sense that artists would  
4 cease to create or collectors cease to  
5 seek out new, creative talent simply  
6 because a somewhat different commercial  
7 arrangement has come into being.

8 I urge you to consider these  
9 observations, and to make your  
10 recommendations on the basis of fairness.

11 Thank you.

12 MR. OMAN: Thank you very much,  
13 Mr. Hirsch.

14 Mr. Koch.

15 MR. KOCH: Thank you.

16 My name is George Koch. I am  
17 Vice President of National Artists Equity  
18 representing visual artists across the  
19 United States.

20 I would like to give some  
21 examples of the collective -- we have  
22 heard some personal examples today, and I  
23 would like to give you some statistics and  
24 a framework to look at visual artists in  
25 the United States.

1  
2  
3           If we could imagine of the  
4 individuals who are in the  
5 audience, that if we took one-half to my  
6 right and made those artists, and the other  
7 half to my left and made those  
8 accountants, or individuals  
9 similarly educated to artists,  
10 and made some comparison,  
11 we would have away of looking at  
12 this group of artists. We heard some  
13 testimony about earnings and so forth,  
14 but there are other economic facts  
15 that are more interesting, I think.

16           The artists to my right  
17 will be unemployed more often than the  
18 accountants to my left. When they are  
19 unemployed, these artists will be  
20 unemployed for longer periods of time than  
21 the accountants on the left.

22           Two other items are critical  
23 to this. One, the artist will work less  
24 as an artist than the accountant will work  
25 as an accountant because the artist's need for

1  
2 support means taking other jobs in order  
3 to support their families, themselves,  
4 and their art habit.

5               Finally, and not  
6 suprisingly, the artists on the right will  
7 earn less in their lifetime than the  
8 accountants on the left. This is  
9 important because you need to look at the  
10 whole as well as the individual  
11 experiences.

12              There have been several comments  
13 made today, and like Sandy, I would like  
14 to address a few that relate to some of  
15 the criticisms of resale royalties.

16              The first issue has to do with  
17 the range of artists. In California you  
18 had Ruth Asawa testify. Ruth created a  
19 fountain in Ghiradelli Square and collected  
20 royalties of about \$5,000 when that  
21 was resold. She's a  
22 relatively well-known  
23 artist in San Francisco, but not beyond  
24 that.

25              On the other hand, to my right

1  
2 you have Jim Rosenquist, who got \$700,  
3 who is a very well-known artist.  
4 Here you see one artist who is unknown get  
5 \$5,000; another artist who is known getting  
6 \$750. These examples go on.

7 In your testimony in California  
8 you heard from Richard Mayer who got \$55.  
9 You also received a letter from Mel  
10 Ramos who has been able to collect his  
11 royalties from sales through the auction  
12 houses because of his tenacity in  
13 following up with California owners and  
14 reminding them of their responsibilities.

15 The other issue is the starving  
16 artist issue. I have always found it  
17 amazing that no one raises the issue about  
18 whether or not Michael Jackson should  
19 receive his royalties, the  
20 Hemingway estate should receive  
21 royalties from his books, or Norman  
22 Mailer should receive royalties from  
23 his intellectual property. I don't feel  
24 that the same argument holds because I  
25 happen to be a visual artist. Yet people

1

2 will raise the issue about whether or not  
3 I, or Jim Rosenquist will be entitled to  
4 the royalty based upon our status.

5

The issue of tracking is  
6 just like Sandy said, in the United States  
7 we'll find a way. No one envisioned  
8 ahead of time the number  
9 of times that Elvis Presley's "Hound Dog"  
10 would be played in the United  
11 States, or how one would be  
12 able to track that. I believe that if  
13 minds are put together a system can  
14 be proposed in order to manage that  
15 tracking.

16

You also heard today that there  
17 are going to be artists for and against  
18 this issue; you heard it in the VAGA  
19 testimony. It's not a popularity contest  
20 that we are dealing with in terms of  
21 whether or not artists are going to have a  
22 right to vote and whether or not they have  
23 these rights. The issue really gets down  
24 to whether or not it's a right that  
25 artists have in terms of the intellectual

1

2 property they create.

3 As in other movements in the

4 United States, whether it has been the

5 women's movement, or the movement of the

6 black man of the United States among

7 African Americans, there have always been

8 individuals for and against.

9 I think what we are looking at, as

10 Sandy said, is what is right with this

11 particular issue.

12 I would just like to say in closing

13 that we are very pleased that we had an

14 opportunity to participate in these

15 hearings, and we look forward to the report

16 by the Copyright Office to Congress on the

17 feasibility of implementing a program of

18 resale royalty in the United States.

19 Thank you.

20 MR. OMAN: Thank you very much,

21 Mr. Koch. I agree that the report that

22 we submit to Congress will frame the issues

23 and is an important undertaking.

24 I should note that we are very

25



1  
2 pleased to have with us at the hearing today --  
3 I just made this discovery a few minutes  
4 ago -- Senator Kennedy's Chief  
5 Counsel, Carolyn Osolinik.

6           If you have any particular  
7 questions of the political intentions of  
8 the United States Senate maybe Ms.  
9 Osolinik will be able to give you some  
10 hints as to what might happen after the  
11 report is submitted.

12           I have a few questions. This is  
13 for anyone on the panel.

14           Congress generally does not act  
15 if there are other means available to  
16 resolve the problems that they perceive to  
17 be out there. We heard this morning  
18 that there are certain alternatives to a  
19 droit de suite, specifically the  
20 contractual provisions that some of the  
21 artists are able to inject into their  
22 contracts. We heard testimony  
23 specifically about the Projansky clause,  
24 which seems to be working well and  
25 to have a universal application.

1

2                   Why shouldn't Congress simply  
3   let the marketplace sort this out? Why  
4   does the government have to rush in with  
5   pistols blazing?

6                   Mr. Koch.

7                   MR. KOCH: I don't think  
8   they are going to need their pistols; they  
9   certainly haven't needed it with music and  
10  other authors' rights.

11                  As Mr. Haacke said in his  
12  testimony earlier, he recognized the fact  
13  that he had a certain position that  
14  allowed him to exercise the rights of the  
15  Projansky agreement and that many artists  
16  did not have that position in order to be  
17  able to exercise these rights.

18                  We also have a unique  
19  relationship between the artist and the  
20  dealer where the dealer is very supportive  
21  of the agreement and spoke about his  
22  sympathies with it. And, so, you have a  
23  unique set of circumstances.

24                  If every dealer in the  
25  United States was a John Weber, maybe you

1  
2 would be correct; but, unfortunately, we  
3 have many different points of  
4 view in the United States among dealers,  
5 as we do among artists, and I think that the  
6 agreement would not be a practical solution.

7               Finally, I would just say  
8 that the issue of rights is an issue  
9 across the board; other authors have  
10 these rights, and we are one of the few  
11 groups of authors of intellectual property  
12 that do not have these kinds of rights.  
13 I think that it comes back to a  
14 fairness issue as opposed to an issue of  
15 how it can be applied in terms of whether  
16 or not a Projansky agreement could be  
17 used.

18               MR. OMAN: Yes, sir, Mr.  
19 Rosenquist.

20               MR. ROSENQUIST: When I served  
21 on the National Endowment for the Arts  
22 between 1978 and 1983, I guess it was, one  
23 of the biggest problems in America was the  
24 lack of an audience for art in America.  
25 Our Chairman, at the time, Livingston Biddle,

1  
2 said at one meeting, "You know,  
3 there's 50 of our great states that aren't  
4 asking for any art help at all, maybe we  
5 should go out and solicit money from them."

6 I think you should come in  
7 with guns blazing to raise the interest,  
8 raise the feeling for art in America to what  
9 exists in other countries because, after  
10 all, it's a great country. Artists in  
11 France and Italy are respected because of  
12 the great heritage there; I think it's  
13 a general support, a legal support  
14 for the arts.

15 MR. HIRSCH: If I can just  
16 follow quickly --

17 MR. OMAN: Yes.

18 MR. HIRSCH: One issue that I  
19 touched on is the issue of fairness. The  
20 art market is really a very small limited  
21 market compared to any other kind of  
22 market that exists in this country, or  
23 elsewhere for that matter. Because the  
24 market is so small, because the artists'  
25 position in it is one --

1

2           MR. ROSENQUIST: It's small.3           MR. HIRSCH: Even smaller, as

4 Jim corrects me -- I think is the very  
5 reason that we need the government to come  
6 in and ensure that there is fairness  
7 throughout.

8           If the market could have  
9 remedied the situation, the market would  
10 have by now remedied the situation.  
11 Clearly, it cannot and it has not.

12           MR. OMAN: I promise you that  
13 will be one of the judgments that  
14 Congress will be making.

15           Mr. Patry, do you have any  
16 questions?

17           MR. PATRY: Yes, I do have  
18 some.

19           Is there any argument to be made  
20 in favor of droit de suite based on the  
21 different economic importance of the  
22 rights?

23           For example, Mr. Rosenquist, how  
24 important to you is the reproduction right?

25

1  
2                   How much money  
3 would you make for authorizing  
4 reproductions of your work compared to how  
5 much money you would have made if there  
6 hadn't been an artist resale royalty right  
7 in place throughout your career?

8                   MR. ROSENQUIST: In the past 31  
9 years I think I have received probably  
10 less than \$3,000 for reproduction rights  
11 for all my work. It's a very small  
12 amount of money from reproduction rights;  
13 it doesn't amount to much of anything.

14                  MR. PATRY: Thank you.

15                  One of the things I would like  
16 to understand, too, is what is the resale  
17 art market for most works. What  
18 type of artists have their  
19 works resold, what type of people resell  
20 them, and how does that market work in  
21 comparison to the primary market, what  
22 sort of artists would this be protecting,  
23 what sort of people would be selling it?

24                  We need some facts so that  
25 we'll know, if Congress is to regulate



1  
2 this area, who is it regulating, who is it  
3 benefitting, and how would it work.

4 MR. ROSENQUIST: I will  
5 try to give you some information.

6 An artist like myself started  
7 working in Manhattan in 1955. I sold  
8 my work for \$300, \$700, \$500, \$1,000,  
9 whatever. And I kept on working, and I  
10 kept on working, and working, and working,  
11 and working, and working, and working over  
12 the years. I had my first prospective  
13 exhibition at the Whitney Museum in 1972,  
14 which went then to Cologne, Germany and  
15 also to Chicago. In that show were  
16 the early works plus the later works.

17 The people said, his late  
18 work is rather nice, but what is really  
19 important, really, is just the feeling  
20 that got him going originally, that is  
21 what is really important. So that is what  
22 is really desirable, that always seems to  
23 be desirable.

24 In May of this year a gallery  
25 which I am not really affiliated with is

1  
2 doing a medium-large show of my 1961  
3 paintings, some of which are in the  
4 middle range that I sold for \$500.

5           There are many artists lately  
6 who have died from various causes, AIDS  
7 being one of them, drugs being another,  
8 among other things happening to  
9 them. Their work, I believe, won't ever  
10 be worth a lot of money because the  
11 people, men and women, didn't have a  
12 chance for a lot of work, so their careers  
13 were cut off right in midpoint.

14           MR. PATRY: Could I follow-up on  
15 that for a second?

16           MR. ROSENQUIST: Sure.

17           MR. PATRY: One of the arguments  
18 to be made is this, when Rauschenberg sold  
19 his painting through his agent,  
20 Leo Castelli,  
21 presumably that was what the market price  
22 for that work was at the time. When the  
23 Skulls resold the work 12 or 13 years later,  
24 presumably that was the market price  
25 for that work at the time as well.

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2  
3  
4                   Is there an argument that in  
5     Rauschenberg's case, as in yours, you continue  
6     to work, you continue to create new works  
7     and develop a reputation, whereas  
8     you pointed out some of the younger  
9     artists who were dying from different  
10    causes don't -- is there an argument that  
11    the increase in the resale price  
12    is attributable to the fact that the  
13    artist has continued to work after that  
14    original sale?

15                   MR. ROSENQUIST: That is true,  
16    and that is partly the reason for a resale  
17    law, because I know many -- I know Bob  
18    quite well, and I know that he's had  
19    extreme ups and downs in his life. At a  
20    certain period of time a royalty certainly  
21    would have helped him get through the  
22    tough spots.

23                   Then the work that people  
24    thought undesirable at one period,  
25    sells sometimes after a long

1  
2 I believe that an artist can  
3 never count on his life as a business,  
4 even though the IRS looks at it as a  
5 business; but it's not really a business  
6 because of the creative aspect, and it's  
7 very, very difficult. So that is the  
8 reason.

9 MR. HIRSCH: I want to jump in.  
10 I think the point you made is a very good  
11 one and a very valuable one.

12 The artist participates very  
13 directly in building his or her market.  
14 That artist participates, as Jim said, as  
15 you alluded to, by continuing to produce.  
16 Those things that sell won't necessarily  
17 sell at high prices. They might, again  
18 as Jim was saying, later on  
19 sell for high prices.

20  
21 Artists are not guaranteed any  
22 kind of stable income from sales. When  
23 their work is in fashion, they can reap  
24 larger or demand larger and higher prices  
25 as they continue to create work. The new

1

2 work they may create may not be in demand  
3 immediately. The work that they had  
4 created years earlier might be in demand  
5 and might demand very large figures. That  
6 artist might come very close to starving.

7

In my work with the

8

foundation I have seen a number of cases  
9 of artists who are very well-known whose  
10 works from an early period sell for very  
11 high prices, yet they gain nothing from  
12 those sales, they come looking to  
13 non-profit organizations like the Gottlieb  
14 Foundation or the Pollock-Krasner  
15 Foundation to help get through that  
16 period. If they could have the benefit of  
17 even a small percent of those resale  
18 royalties, they could more than likely keep  
19 going without the kind of fear, and  
20 anxiety, and hardships that they now have  
21 to endure. Not necessarily that a resale royalty  
22 will cure all the evils in the world, it won't  
23 by any means; it will certainly help.

24

MR. OMAN: Does anyone have the

25

audacity to suggest that suffering is good

1  
2 for an artist --

3 MR. HIRSCH: If they do, they  
4 will hear from me very quickly.

5 MR. OMAN: -- You know, the  
6 stereotype of a Grub Street scholar living in a  
7 garret eating cat food somehow enobles the  
8 spirit and creates great works of art.

9 MR. HIRSCH: It also kills  
10 people.

11 MR. OMAN: Yes. I think that is  
12 the answer to the question.

13 MR. PATRY: Thank you.

14 MR. OMAN: That completes our  
15 questions.

16 Thank you very much. It was a  
17 pleasure having you with us today, and we  
18 are grateful for your testimony.

19 (Panel was excused.)

20 MR. OMAN: Our next witness is  
21 Tom Dackow, an independent expert who has  
22 developed a system for restoring and  
23 retrieving images of works of art.

24 Mr. Dackow will provide an  
25 explanation of the systems that exist



1  
2 for restoration and retrieval.

3 Thank you very much for taking  
4 the time to appear with us today.

5 MR. DACKOW: I am happy to be  
6 here.

7 MR. OMAN: The floor is yours.

8 MR. DACKOW: I have been  
9 involved in the development of two  
10 different systems for two different  
11 purposes, which deal with the recording  
12 and transmission of images of artworks.  
13 I would like to mention that they are  
14 part of a species of systems which are  
15 designed generally with the same end  
16 purpose in mind, and the medium for the  
17 delivery can change from either telephone  
18 transmission to distribution through the  
19 utilization of optical media. The  
20 processes I have been concerned with have  
21 generally been concerned with capturing  
22 information about artwork, and one of  
23 the pieces of information happens to be  
24 the visual information.

25 One of the systems I developed

1  
2 was for a group called the Art Lost  
3 Register, and it's concerned with the  
4 relocation of stolen artworks. It is, as  
5 the name suggests, a registry. Works  
6 which have been stolen are registered  
7 generally by the previous owners or by the  
8 insurance company who, in fact, is the  
9 then current owner, and this data is stored  
10 in a repository and either compared against  
11 artworks that are presented for auction, or  
12 used in response to inquiries from  
13 the police, Interpol, Scotland Yard, the  
14 FBI. All sorts of groups use that  
15 particular reservoir as an information  
16 source.

17           The other system I have worked  
18 on, which is being provided by Centrox  
19 Corporation, is a system that is designed  
20 to monitor the sale of works worldwide.  
21 It consists of a series of scanning  
22 stations. The art catalogs that are  
23 published by various auction houses around  
24 the world are scanned, some information is  
25 entered into them, the information is then

1  
2 placed on optical disks, and that  
3 information can be accessed worldwide  
4 through a global network. It's generally  
5 used by people who are either in the  
6 business of buying or selling such  
7 artworks. So, in a certain sense, it's an  
8 extension to the catalogs.

9 MR. OMAN: Do they subscribe on  
10 a yearly basis or pay a fee every time  
11 they use your data bank?

12 MR. DACKOW: It actually is a  
13 combination of both. In point of  
14 fact, I think the whole question as to how  
15 that kind of service might be priced is  
16 unknown because it is not entirely clear  
17 what the market requires at this point.  
18 I think that will be changing over  
19 time; but it's quite a bit like the other  
20 indexes. There's the art index that I  
21 believe comes out of England, it has got a  
22 similar function: As artworks are sold the  
23 information is recorded and is available  
24 for retrieval. It can be used for a  
25 variety of purposes, it can be used for

1  
2 appraisals by insurance companies. In one  
3 instance it's being used by a large bank  
4 in the trust area to determine the  
5 collateral worth of works of art that are  
6 being placed with the bank by clients who  
7 are borrowing money against those works.

8 I guess in the simplest  
9 sense, it's a way for people to look  
10 quickly through a vast amount of material  
11 without having to go to libraries or other  
12 places where that material has  
13 traditionally been stored.

14 MR. OMAN: The  
15 Judiciary Committee is concerned about  
16 privacy, especially in this electronic age  
17 where data bases are accessible all over  
18 the world and some of the information  
19 on these data bases is  
20 confidential.

21 Is there a technical way  
22 to insure that the artists and their  
23 representatives have the information they  
24 need without encroaching on their privacy  
25 in the process?

1

2

MR. DACKOW: The two

3

systems I have described are quite

4

different. In one instance privacy is the

5

key issue, and that is the stolen work

6

repository, for a variety of reasons.

7

People often don't want the world at

8

large to know that something that they

9

purchased was stolen for a variety of

10

reasons. So in that instance it's under

11

very close control; there is no access

12

from anyplace outside of the small group

13

of people who actually operate the

14

system. There are two copies, one in

15

London and one in New York as a matter of

16

operational convenience.

17

The only consideration that has

18

been seriously given to extending that

19

information beyond the confines of the

20

organization is a recent request from

21

Scotland Yard to have access to the

22

information as well. But it's generally

23

perceived that it would be a grave mistake

24

to make that information available to

25

other groups.

1  
2           In the second case, in the case  
3 of the Centrox System, the information is  
4 already available, the catalogs can be  
5 subscribed to, they can be purchased for a  
6 nominal fee from any of the 170-some  
7 auction houses that are represented. So  
8 it's not really a question of whether or  
9 not the information is public or private,  
10 it's already public. In fact, they  
11 generally have Library of Congress numbers  
12 assigned. So, I don't think that is, in  
13 this situation, an issue. What is  
14 different is there is easier access to the  
15 information.

16           MR. OMAN: Mr. Patry.

17           MR. PATRY: But if there were a  
18 droit de suite law that applied to dealers  
19 perhaps the same public information  
20 wouldn't be around.

21           MR. DACKOW: I'm sorry. Would  
22 you repeat that?

23           MR. PATRY: Yes.

24           If there were a law that required  
25 auction houses to pay royalties --



1

2

MR. DACKOW: Yes.

3

MR. PATRY: -- then there

4

wouldn't be a problem, as you say, because

5

that information is publicly available;

6

but what if the law applied to dealers as

7

well as to galleries?

8

My understanding is that

9

information is not always publicly

10

available.

11

MR. DACKOW: That's correct.

12

MR. PATRY: Would the concerns

13

that Mr. Oman expressed then be

14

relevant?

15

MR. DACKOW: I actually don't

16

see how, if I understand the

17

question. Dealers don't have at

18

this point, to my knowledge, any

19

requirement to make public the information

20

about what they are buying and what they

21

are selling; so there is no way that the

22

kinds of systems that I have developed

23

would even have that information

24

available.

25

It sounds to me as if you are not

1  
2 so much concerned with making the  
3 information private as with making it  
4 public. Until it's public the kinds of  
5 systems that we developed would have no  
6 access to it.

7  
8 If it were required  
9 that it be made public in lieu of catalog  
10 publication, that would certainly be a  
11 vehicle that could be used for  
12 distribution. I have reason to  
13 believe that there would be incentive to  
14 use it that way on the part of the people  
15 that are in a position to provide that  
16 information.

17 MR. PATRY: Yes.

18 In Europe, especially in  
19 Germany, since the law does apply to  
20 galleries there, a critical component  
21 is a legislative requirement that an  
22 artist or the artists' society have access  
23 to information. It's difficult  
24 perhaps to enforce a right to collect a  
25 royalty if you don't know when the sale

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1  
2 took place. A component of that could  
3 be a requirement somehow that you have  
4 access to information about sales --

5 MR. DACKOW: Yes.

6 MR. PATRY: -- and you could do  
7 it any number of ways, you could make the  
8 information public, you could make it  
9 somehow private. Presumably, the  
10 system that we were just talking about  
11 could be put in place to operate either  
12 way, or to at least keep track of those  
13 sales.

14 MR. DACKOW: I would expect that  
15 in a situation where the information was  
16 made public that it could be picked up by  
17 any of the services that currently are in  
18 that business because it would provide the  
19 same benefits to their subscribers.

20 One of the things that is  
21 convenient about the types of systems we  
22 are talking about is that it does make a  
23 lot of information that would be quite  
24 difficult to gather together on an  
25 individual basis available to a fairly

1

2 large group at a fairly nominal cost.

3

4 I think if you were to go to  
5 either of these organizations and look at  
6 the amount of effort required to capture  
7 that information you would realize that it  
8 would be very difficult for other  
9 organizations to replicate it unless they  
10 were prepared to have the same costs,  
11 which is, in fact, probably in the order  
12 of \$100,000 a month. It is not an  
13 inexpensive process to maintain that type  
14 of information reservoir; it's fairly  
15 expensive.

16 MR. PATRY: Thank you very  
17 much.

17

18 MR. OMAN:  
19 Thank you.

20

21 MR. OMAN: Our next witness is the Chair  
22 of the Committee on Art Law of the Association  
23 of the Bar of the City of New York.  
24 Mr. John Koegel will present the  
25 Association's views.

1

2

I note that we are on schedule.

3

And we have allocated 15 minutes for Mr.

4

Koegel.

5

We welcome you to the

6

hearing and look forward to your

7

testimony.

8

MR. KOEGEL: Good afternoon,

9

your Honor.

10

May I approach the bench?

11

MR. OMAN: Let the record note

12

that I am not the honorable. The Register

13

of Copyrights is not confirmed by the

14

United States Senate, so, therefore, does

15

not officially qualify for the title "the

16

Honorable," merely Mr. Ralph Oman.

17

MR. KOEGEL: Well, as you

18

pointed out, my name is John Koegel, and I

19

am appearing as Chairman of the Committee

20

on Art Law of The Association of the Bar

21

of the City of New York.

22

The Committee on Art Law is

23

a standing committee of the Association.

24

It is comprised of 28 members,

25

on an annually rotating basis. The members

1

2 are typically fairly varied, but most are  
3 very involved as attorneys in the arts. And,  
4 as I said, membership rotates from year to year.

5 The Committee's work is also  
6 carried out in coordination with other  
7 committees, so that the comments that I  
8 have presented to you have been reviewed  
9 by the Copyright Committee and  
10 by the Executive Committee of the  
11 Association. Therefore, my submission  
12 represents the views of the Association  
13 as a whole.

14 I should also note that in 1987  
15 the Committee on Art Law, which, of course,  
16 was a different committee then, studied  
17 the Kennedy legislation which had a resale  
18 royalty provision, and it authored a rather  
19 lengthy report at that time. When the inquiry  
20 from the Copyright Office came up, the current  
21 Art Law Committee revisited the concept  
22 and we, of course, looked at the questions  
23 that you had asked. The Committee  
24 concluded that it did not approve of the  
25 resale royalty concept, as



1  
2 had been the case in 1987. Therefore,  
3 it declined to answer the questions, most  
4 of which were implementation oriented.  
5 You have before you the position of a  
6 subcommittee which wrote up the reasons  
7 why the Committee had declined to approve  
8 the concept.

9               Since I happen to disagree with the  
10 Committee's position, I asked the subcommittee  
11 Chairman to give these remarks. Unfortunately,  
12 he pressed me to appear, so here I am  
13 to present this report.

14  
15               The Committee came up with seven  
16 reasons why it saw barriers to or detriments in the  
17 resale royalties concept. First, they felt that  
18 a resale royalty would help only the successful  
19 artist who already benefits financially  
20 from appreciation of his earlier work. They  
21 also could not see any direct current  
22 financial help to the, quote, "struggling artist."

23  
24               Second, the Committee thought  
25 that sellers, purchasers, and other owners

1  
2 had a reasonable right to  
3 confidentiality and would not want the  
4 sales price publicly disclosed. And, of  
5 course, if any resale royalty law were to  
6 be enacted it would have to somehow enable  
7 artists to obtain that information.

8 Third, the Committee thought that  
9 the resale royalty right was too remote  
10 and too uncertain for it to provide an  
11 incentive to create.

12  
13 Fourth, the Committee saw a conflict  
14 with the first sale doctrine in copyright law.  
15 And while recognizing that Congress could  
16 change that, the Committee thought that there  
17 was not a compelling need to abandon that  
18 doctrine in the copyright law.

19 Also, the Committee saw a resale royalty  
20 right, especially one that was  
21 nonwaivable, as an interference with the  
22 ability to contract because it would be  
23 like a nut there that you  
24 could not get around.

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Sixth. The Committee saw it as unfair to collectors who are really the ones taking the big risks and therefore should reap all the rewards and not have to share any profit.

And, finally, the Committee thought droit de suite would push the art market underground or overseas.

So, those are the seven reasons for the Committee's opposition.

The Committee did recognize, however, that most of these concerns were in the nature of conjecture. Therefore, the primary recommendation of our Committee is that the Copyright Office base its report on empirical evidence rather than on theory which is the root of what has been presented to you so far.

I myself am a bit ambivalent on the subject of resale royalties because I am concerned about the political capital and the effort that

1  
2 would be needed to pass legislation of  
3 this nature given the obstacles and the  
4 controversy it seems to engender. But I am  
5 nevertheless inspired to speak,  
6 because of the demagoguery and the  
7 strong-man tactics from the  
8 auction houses, art dealers, and museums.  
9 For example, these interests like to call  
10 the resale royalty a tax, but we know that a  
11 tax is a levy imposed by the government  
12 for a governmental purpose. The resale royalty  
13 is not a tax, and yet they like to say that it is.  
14 My Committee got sucked into this "straw  
15 like" argument a bit when it said that a resale  
16 royalty would not accomplish the purpose for which  
17 it was intended. And, here the Committee and  
18 others are saying that the primary purpose  
19 is to help the struggling artist.  
20 The problem with this argument is that  
21 nobody ever said that this concept was designed  
22 to provide immediate financial benefits to  
23 struggling artists. On the contrary, the concept  
24 of a resale royalty is, like the copyright law  
25 itself, a system of rewards for the successful

1  
2 artists. It rewards successful creativity, not  
3 unsuccessful creativity. It rewards success, and,  
4 of course, in so doing, creates an incentive to  
5 create and an incentive to publish. And  
6 how the art dealers, museums, and auction houses  
7 can say there is no incentive is beyond  
8 me. You have to speak to artists to know  
9 whether or not an incentive exists.

10

11 I represent artists, and I  
12 believe that there is an incentive when  
13 there is the recognition that a future reward  
14 will be achieved. A resale royalty right  
15 creates an incentive to allow work to be  
16 sold early in one's career with the solace  
17 that there will be a financial  
18 participation in the future.

19 The opponents of this concept also  
20 talk about the burden on the market. One  
21 important point often overlooked is that a  
22 resale royalty does not affect the original  
23 purchase transaction. It is of no  
24 consequence to that event.  
25 Yet, there is

1  
2 all this hubris of how a resale royalty right  
3 would dissuade people from purchasing art  
4 because 20 years from now when they resell  
5 that art, they might have to pay five percent  
6 of any profit. That is absurd. There simply  
7 is no negative impact on the original  
8 transaction.

9           Indeed, I think that the resale royalty  
10 would be a positive aspect or element in the  
11 original purchase. The artist and the collector  
12 would to some degree mutually benefit from the  
13 artist continually trying to enhance the overall  
14 value of his work. This connection between  
15 artist and collector is a valuable one that  
16 I think is often overlooked.

17

18

19           I am glad you asked Jim  
20 Rosenquist about reproduction  
21 rights, because there is no significant  
22 economic value in reproduction rights for  
23 visual artists. The only way a visual artist  
24 realistically participates in the success of  
25 a work of art -- and this is being said



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2 over and over again -- is through participation  
3 in the appreciated value of that work.

4

Finally, I submit that this study  
5 comes at a very important time for visual  
6 artists. The concept of a resale royalty  
7 right provides or is based on respect for the  
8 role of the artist in creating great works of  
9 art. It further recognizes that visual artists  
10 do not have the same ability as other authors to  
11 participate in the success of their works.

12

13

14

15 MR. OMAN: Thank you very much,  
16 Mr. Koegel.

17

You capture within your  
18 testimony the tensions involved  
19 in the issue.

20

Senator Mathias once told me of  
21 a great moment in the Maryland legislature  
22 when one legislator got up and said that  
23 some of our friends are in favor of this  
24 proposal, some of our friends are against  
25 it, and we are going to stick with our friends.

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You are sticking with your friends on this issue. It is a difficult issue with a lot of strong passions; but we are grateful for the insight. Your paper also provides a great deal of useful information.

Thank you very much for that.

Let me ask Mr. Patry if he has any questions.

MR. PATRY: I don't.

Thank you very much.

(Panel was excused.)

MR. OMAN: Our final panel consists of three witnesses: Stephen Weil, Deputy Director of the Hirshhorn Museum in Washington; Gilbert Edelson, Administrative Vice President, Art Dealers Association of America; and Mitchell Zuckerman, President, Sotheby's Financial Services Incorporated.

Mr. Weil has written about droit de suite for a long time, and I

1  
2 believe has described himself as a fierce  
3 opponent of the concept. Why don't we  
4 begin with Mr. Weil?

5 MR. WEIL: Thank you.

6 And good afternoon.

7 As the panel members know, I have previously  
8 raised questions about the propriety, the utility and  
9 the potential consequences of the resale royalty in two  
10 articles which were originally published in the March,  
11 1978 and May, 1991 issues of ARTnews magazine. Copies  
12 of those articles have been submitted to the Copyright  
13 Office, and I will not attempt to repeat their substance  
14 here. The observations that follow will be brief, and  
15 are intended to be largely supplementary. They represent  
16 solely my own views and in no way reflect those of the  
17 Hirshhorn Museum or the Smithsonian Institution.

18 Like any market, the art market is a complex  
19 mechanism. Proposed legislation that would substantially  
20 interfere with its customary operation ought not to be  
21 considered lightly. That a particular group of visual artists  
22 might themselves benefit through the establishment of a resale  
23 royalty is not in itself a sufficient reason for its imposition.  
24 To justify resale royalty legislation, something more would be  
25 necessary. A simple three-part test might be as follows:

1           First: What (in the language of  
2 an old English case) is the particular  
3 "mischief" that the proposed legislation  
4 would be intended to remedy?

5           Second: To what extent would  
6 such legislation in fact be effective to  
7 remedy that particular mischief? And,

8           Third: In its consequent  
9 redistribution of economic benefits and  
10 burdens, to what extent might the proposed  
11 legislation be the source of some new  
12 mischief as great or greater still  
13 than the mischief it was initially  
14 intended to remedy?

15           The case of the resale royalty  
16 has been argued intermittently in the  
17 United States since it was first proposed  
18 by Diana B. Schulder in 1966. In my own  
19 view, its proponents have yet to offer any  
20 consistently satisfactory answer to the  
21 most basic of these questions: What is  
22 the "mischief" that such a royalty would  
23 be intended to remedy? In general, their  
24 efforts to justify a resale royalty have  
25 followed four principal lines:

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2           First: that increases in the  
3 market value of a work of art subsequent  
4 to its first sale are attributable to the  
5 artist's continuing efforts.

6           Second: that the inequality of  
7 bargaining power between those who produce  
8 art and those who collect it gives rise to  
9 a situation through which collectors are  
10 enabled to enrich themselves unjustly at  
11 the expense of artists.

12           Third: that visual artists  
13 suffer an economic disadvantage in  
14 comparison to such other serious creative  
15 individuals as authors and composers who  
16 receive a greater part of their  
17 compensation through royalties; and

18           Fourth: that the resale  
19 royalty -- functioning as a sort of economic  
20 "umbilical cord" -- might serve as the means  
21 through which visual artists could  
22 maintain a continuing relationship with  
23 the works of their own creation.

24           To take these arguments in order:

25

1  
2           First: That an artist's  
3 continuing efforts might -- as an incidental  
4 consequence -- increase the secondary market  
5 value of his or her earlier work is  
6 certainly true. It is equally true,  
7 however, that the artist's premature death  
8 might produce exactly the same effect. So  
9 could the artist's failure -- see, for  
10 instance, the examples of de Chirico,  
11 Vlaminck, or Utrillo -- to live up to his  
12 or her earlier promise. So could a  
13 devastating studio or warehouse fire that  
14 reduces the available supply of the  
15 artist's work. So could the inclusion of  
16 the artist's work in a particularly  
17 well-known collection. So even could an  
18 inflation of the art market generally.  
19 Unpalatable as some may find it, works of  
20 art in the marketplace are priced like any  
21 other commodity. Their value in the  
22 market fluctuates with the interplay of  
23 supply and demand. Any number of factors  
24 can impact one side of that equation or  
25 the other. What the artist does is simply



1  
2 one of these factors.

3           Let us assume, though, for  
4 argument's sake, that the artist's  
5 continuing efforts could be identified as  
6 the principal factor in increasing the  
7 value of his or her work. By what  
8 self-evident principle would it then  
9 follow that the artist was entitled to a  
10 share of any such increase? If I should  
11 be able to sell my house for more than  
12 otherwise because a real estate developer  
13 had built a golf course nearby, would  
14 anybody seriously argue that I should pay  
15 the developer some portion of that  
16 incidentally-bestowed benefit? Likewise,  
17 if the value of my house were to increase  
18 because the architect who designed it  
19 subsequently became famous, would anybody  
20 really contend that the architect was  
21 entitled to share in some portion of the  
22 sale proceeds? Incidental benefits, like  
23 incidental burdens, are simply a normal  
24 part of everyday life. We don't keep  
25 books on them. We simply assume that they

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2 will more or less balance out over time.

3

4 Second: The argument that would  
5 justify a resale royalty on the unequal  
6 bargaining power of artists and their  
7 collectors appears rooted in that romantic  
8 vision of the art world which Monroe and  
9 Ainee Brown Price described in their 1968 Yale  
10 Law Journal article <sup>1</sup> analyzing how such royalties  
11 worked in France. It was, they said, a vision

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. . . of the starving  
artist, with his genius  
unappreciated, using his  
last pennies to purchase  
canvas and pigments which  
he turns into a misunder-  
stood masterpiece. The  
painting is sold for a  
pittance. . . . The  
purchaser is a canny  
investor. . . . Thirty  
years later the artist is  
still without funds and  
his children are in rags;  
meanwhile his paintings,  
now the subject of a  
Museum of Modern Art  
retrospective. . . fetch  
small fortunes at Parke-  
Bernet and Christie's....  
The droit de suite is La  
Bohème and Lust for Life  
reduced to statutory  
form.

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<sup>1</sup> Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale Law Journal, 1330.

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The description of the nineteenth-century Parisian art scene given by Liliane de Pierredon-Fawcett in her comparative law study The Droit de Suite in Literary and Artistic Property<sup>2</sup> is not marketedly different:

In point of fact, while Impressionist masters, excluded from official publications, were scorned by the public, certain shrewd dealers bought their paintings at ridiculously low prices. General disdain was followed by infatuation and these same paintings then commanded extraordinary amounts of money. . . . The artists were excluded from this wealth.

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Whether or not this once was the case in France, it is most emphatically not the case in the United States today. It is true, certainly, that the overwhelming majority of American artists earn extraordinarily little from their calling. A 1991 study by the Center for Arts and Culture at Columbia University

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<sup>2</sup> Center for Law and the Arts, Columbia University School of Law, 1991.

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2  
3 indicated that 73 percent of  
4 currently-active painters earned annual  
5 incomes of \$7,000 or less from the sale of  
6 their artwork. Fewer than five percent  
7 had annual incomes from their art  
8 of more than \$40,000. In each case, these  
9 are gross figures before any deduction for  
10 studio and other art-related expenses.

11           It is also certainly true that  
12 there are a number of living American  
13 artists whose work can regularly command  
14 five-to-seven figure prices in the  
15 secondary market. There are not, however,  
16 very many of these. For works of art to  
17 be offered for auction in the main  
18 salesrooms of Sotheby's or Christie's, for  
19 example, their estimated value must  
20 generally be \$10,000 or greater.  
21 According to a representative of  
22 Sotheby's, the total number of living  
23 American artists whose work was thus  
24 offered for sale at either auction house  
25 during the 1990-1991 season was 219.

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2 That constitutes something considerably  
3 less than one percent of all the visual  
4 artists now working in the United States  
5 and perhaps, even, as little as one-tenth  
6 of one percent. Adjust this figure as you  
7 may, it will still include only a handful  
8 of artists.

9

What has yet to be demonstrated  
10 is that any substantial number of  
11 contemporary American artists are  
12 themselves living in reduced circumstances  
13 while their work is simultaneously  
14 commanding high prices in the secondary  
15 market. That should be no surprise.  
16 These markets are not independent of each  
17 other. They are functions of one  
18 another. What emboldens a collector to  
19 pay a higher price for an artwork on its  
20 first sale in the primary market is the  
21 knowledge of a strong secondary market  
22 that can act as a safety net in case the  
23 work should be resold. A \$100,000  
24 painting that can, with some certainty, be  
25 resold for at least \$90,000 requires a

1  
2 great deal less courage to purchase than a  
3 \$20,000 painting that can never be resold  
4 at all.

5           Also implicit in this unjust  
6 enrichment argument is the suggestion that  
7 collectors may be able to use their  
8 putatively greater bargaining power to buy  
9 works of art from artists for less than  
10 their real worth. This too involves a  
11 romantic fiction. In economic terms,  
12 there is no "real worth" to a work of art  
13 (or anything else in the market) except  
14 what a purchaser will pay for it. Works  
15 of art are worth what they sell for once  
16 the calculus of supply and demand has run  
17 its course. The argument that collectors  
18 enrich themselves unjustly at the expense  
19 of artists remains to be proved.

20           Third: Again, it certainly is  
21 true that visual artists are compensated  
22 in a different manner than other creative  
23 individuals. That, however, has not  
24 necessarily worked to their disadvantage.  
25 To the contrary, the successful visual



1  
2 artist would, when measured in economic  
3 terms, appear to have been enormously  
4 successful. While Pablo Picasso (with an  
5 estate estimated in the billions of  
6 dollars) or -- to move from the sublime to  
7 the local -- Andy Warhol (on February 11,  
8 The Chronicle of Philanthropy reported his  
9 estate to now be valued at \$298 million)  
10 may represent an extreme, one must  
11 nevertheless be struck by the number of  
12 American artists who have been able to  
13 leave behind such sizable  
14 charitable enterprises as the Rothko  
15 Foundation, the Pollock-Krasner Foundation  
16 or the Adolph and Esther Gottlieb  
17 Foundation. There is no evidence that  
18 serious creative artists who are  
19 compensated through royalties have done  
20 nearly so well as have successful visual  
21 artists.

22           It is argued, lastly, that the  
23 resale royalty might serve as a sort of  
24 "umbilical cord" to permit the artist some  
25 continuing relationship with his or her

1  
2 work. As I have pointed out elsewhere, though,  
3 an umbilical cord that transmitted nothing  
4 but potential gains would be a very  
5 curious and selective appendage indeed.  
6 Filtered out entirely would be the  
7 collector's ongoing expenses for framing,  
8 insurance, conservation, storage, and the  
9 time-use of capital. Filtered out as well  
10 would be whatever loss the collector might  
11 suffer on a resale, even a resale of the  
12 same artist's work. In the best of all  
13 worlds, where it didn't cost anything to  
14 own anything and the art market could only  
15 go up, such a one-way umbilical cord might  
16 still have a certain plausibility. In the  
17 real world, where everything has a cost  
18 and the value of artworks can both go up  
19 and go down, it seems manifestly inequitable.

20 To move then to the second point  
21 of our inquiry: If we nonetheless could  
22 perceive some mischief here that needed  
23 be remedied, what kind of a resale royalty  
24 would be effective to provide such a  
25 remedy?

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2           If the collector's putatively  
3 unjust enrichment is taken to be the basis  
4 for imposing such a royalty, then the  
5 basis for calculating the royalty ought to  
6 be relatively simple. It would be based,  
7 presumably, on the net amount by which the  
8 collector had been enriched after reducing  
9 the gross profit realized by the cost of  
10 resale and by whatever other deductible  
11 expenses had been incurred during the  
12 intervening period of ownership. It  
13 would, in other words, be calculated in  
14 much the same fashion as any other income  
15 tax. Thorny questions to be resolved  
16 might include the degree to which losses  
17 on the sale of contemporary art might be  
18 balanced against gains, the degree to  
19 which inflation might be taken into  
20 account in measuring gains and losses and  
21 the calculation of the cost-basis of works  
22 of art received as gifts or bequests or  
23 through exchanges.

24           Whether the Copyright Act (not  
25 to say the Copyright Office) is the most

1  
2 appropriate vehicle through which to  
3 operate such a mechanism, or whether it  
4 would be better left to the Tax Code and the  
5 Revenue Service, is by no means clear.  
6 Also unclear is how such an additional tax  
7 might be integrated into the existing  
8 system of tax law. Neither is it clear  
9 whether a proposal to increase the tax  
10 burden on capital gains transactions of  
11 this particular kind would have any real  
12 political viability just now.

13           Wholly clear, however, ought to be how  
14 rational such an income-tax-like approach would  
15 be in comparison to what has most frequently been  
16 proposed and what actually became  
17 the law in California:  
18 a resale royalty, based on an  
19 artwork's entire resale price, i.e., on  
20 both the collector's profit and on the  
21 collector's underlying capital  
22 investment. In her study of the droit de  
23 suite, Ms. Pierredon-Fawcett acknowledges  
24 that such an approach, as it was applied  
25 in France, "departed from [the]

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2     rationale" of the resale  
3     royalty. She seems to suggest, however,  
4     that a resale royalty based on  
5     appreciation alone, i.e., one that  
6     functioned as a form of income tax, would  
7     have been impractical in France because of  
8     the difficulty in tracking successive  
9     sales. Our situation in the United States  
10    is, of course, different. In general, the  
11    requirement that such sales be reported  
12    for income tax purposes would put most of  
13    the necessary information on official  
14    record.

15                 Rather than remedy any claimed  
16    mischief, a resale royalty calculated on  
17    the entire selling price produces a wholly  
18    arbitrary distribution of benefits. In  
19    place of some estimate of the increase in  
20    the value of art works, it substitutes the  
21    velocity of their turnover as the chief  
22    determinant of who is to get how much. As I  
23    pointed out last year:

24                 Using the California  
                  formula of a royalty  
                  equal to five percent of  
                  the gross selling price,

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we can obtain the following results: Two artists each sell a painting for \$10,000. One is resold four times at the progressively higher prices of \$20,000, \$40,000, \$60,000, and \$80,000. The artist receives a total of \$10,000 in resale royalties. During the same time period, the other painting is resold only once, but for \$100,000. The second artist -- albeit his work is more highly valued by the market -- gets \$5,000, or just half as much.

3

Even that, however, may be beside the point. Regardless of how a resale royalty is to be calculated, it still cannot remedy the mischief complained of if the law itself is readily avoidable. We have been told in the past, for example, that the California law has not been wholly effective because it was too easily avoided by the removal of commercial transactions to other states. Art world transactions can be removed to other countries as well. The recent



1  
2 decision of the Court of Appeals in  
3 Dusseldorf that the German artists'  
4 proceeds right -- a part of German copyright  
5 law -- had no extraterritorial application  
6 to a sale of German art (specifically the  
7 work of Joseph Beuys) in England should be  
8 a caution.

9           For highly valued works of art,  
10 the cost of removing their resale from the  
11 United States to a more hospitable  
12 jurisdiction might be a fraction of the  
13 resale royalty that would be otherwise  
14 payable by selling them here. While this  
15 outcome might, in turn, be avoided by  
16 truly reformatting the resale royalty into  
17 some form of an income tax, there would be  
18 mind-boggling complexities in collecting  
19 such a tax through the Treasury Department  
20 and then redistributing it as some kind of  
21 a government grant-in-aid to a specific  
22 group of largely well-to-do artists.

23           Once again, though, let us  
24 suppose that the resale royalty could be  
25 justified and that these hurdles could be

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2 overcome. Are we certain that the good  
3 which is then to be accomplished for some  
4 few artists will not be outweighed by the  
5 harm that may be done to the mass of  
6 them? By no means.

7

8 The 1978 analysis of the  
9 California Resale Law by the Vanderbilt  
10 University economists Ben Bolch, William  
11 Damon, and C. Elton Hinshaw <sup>3</sup> is clear on  
12 this point. According to their  
13 calculations, the introduction of the  
14 royalty could be anticipated to depress  
15 prices generally in the primary market.  
16 For a handful of artists, that would later  
17 be compensated and more by the royalties  
18 expected to be received in subsequent  
19 years. For most artists, however, the  
20 initial loss would never be made up.

21 "Profitable resale of artwork is  
22 rare," they wrote. "Few artists have a  
23 secondary market and few works of art  
24 appreciate significantly in value. The  
25 resale royalty law will result in only a  
small economic gain to a few and an

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<sup>3</sup> An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689.

1  
2 economic loss to many should be repealed  
3 for the sake of the artists affected."  
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5           The Bolch-Damon-Hinshaw analysis  
6 contemplated that the introduction of  
7 resale royalties would generally depress  
8 the prices collectors were willing to pay  
9 in the primary market. Under an even  
10 grimmer scenario, however, some number of  
11 those collectors might abandon the market  
12 for contemporary art altogether in favor  
13 of some other and less-disadvantaged form  
14 of collecting: art by long-dead artists,  
15 baseball cards, or American pottery. They  
16 need only be a fraction of collectors to  
17 have some impact on contemporary artists  
18 generally.

19           This is speculation, of course,  
20 but nonetheless the possibility that the  
21 introduction of resale royalties might  
22 impact both the price level and breadth of  
23 the primary market for contemporary art  
24 and, simultaneously, drive some part of the  
25 secondary market overseas ought give pause

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2 to even its most ardent proponents. If  
3 the moneys collected were perhaps to  
4 benefit the visual artist community  
5 generally -- if they were to be used, for  
6 example, to help provide more adequate  
7 health insurance for artists -- then those  
8 risks might be justified. It might even  
9 then make sense to seek a royalty on all  
10 sales of art, on sales of new and old art  
11 alike. A universal surtax on art sales to  
12 benefit artists generally is not, however,  
13 what is before us. What we are  
14 considering here is a narrow impost on  
15 contemporary art that would provide only a  
16 small group of artists with any  
17 substantial benefit.

18           As hitherto formulated, the  
19 resale royalty directs its benefits to  
20 those artists who least need them while at  
21 the same time posing a distinct danger and  
22 offering little or nothing by way of  
23 recompense to those artists who could most  
24 benefit from its help. It is not merely,  
25 as the Prices concluded in their 1968

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2 study of the droit de suite, that "to  
3 those who have shall more be given."  
4 Worse still, it is all too possible that  
5 from those who already don't have  
6 even more shall be taken.

7 Twenty-six years of discussion ought to  
8 be enough. However well-meant in its  
9 conception, the resale royalty simply will  
10 not work under the specific conditions of  
11 the art market as we know it in the United  
12 States. It deserves to be put to rest.

13 Thank you.

14 MR. OMAN: Thank you very much,  
15 Mr. Weil.

16 Mr. Edelson.

17 MR. EDELSON: Thank you, sir.

18 I have not handed up a written  
19 statement, and I would request your  
20 permission to submit the statement I am  
21 about to make in writing after this  
22 hearing.

23 MR. OMAN: That will be fine.

24 MR. EDELSON: I have previously  
25 submitted a statement when the comments

1  
2 were first requested on behalf of the Art  
3 Dealers Association of America, which I  
4 assume you have, and I will, therefore,  
5 not repeat the contents of that statement.

6 I would wish, however, to call  
7 your attention to the two page document  
8 which was included in that document headed  
9 Arguments Against the Resale Royalty.

10 There are a few points which  
11 require additional emphasis.

12 Although, for some reason, the  
13 term "resale royalty" is being used by  
14 some, the proposal which is being  
15 considered is not a royalty as we know  
16 that term, that is a payment for the  
17 license to use copyrighted works. The  
18 proposed resale royalty, when you really  
19 analyze it, is really a tax imposed on the  
20 seller by the government for the benefit  
21 of a specific artist.

22 I want to emphasize that the  
23 position which we have taken is pro-artist  
24 in the larger sense. Artists after all  
25 need to support themselves from the sale



1  
2 of their work. Those sales are critical  
3 to the artists' financial well-being.  
4 Those sales are made to collectors. That  
5 which encourages collectors to acquire  
6 works by living artists, benefits living  
7 artists. That which discourages or  
8 inhibits collectors from acquiring work by  
9 living artists, hurts those artists.  
10 Based upon our collective knowledge of the  
11 American art market and of the buying  
12 habits of collectors, we are of the strong  
13 view that the net result of the enactment  
14 of what amounts to a tax on art will  
15 discourage and inhibit collectors from  
16 acquiring works by living artists,  
17 particularly works by younger, or emerging  
18 artists, which are already the most  
19 difficult to sell. This is especially true  
20 in the present art market which is suffering  
21 considerably in today's economic climate.

22

23 Consider the tax consequences to  
24 the collector of works by living artists.  
25 To begin, this collector is in a very

1  
2 risky field. We estimate -- and the  
3 figures that Mr. Weil quoted confirms -- that  
4 98 percent of works by living artists  
5 decline in value, they never achieve a  
6 secondary market. Only a tiny percentage,  
7 perhaps less than one percent of living  
8 artists have a secondary, or resale,  
9 market for their work. The likelihood  
10 then is that a person buying a work by a  
11 living artist will never profit  
12 financially. And that loss is not even  
13 tax deductible.

14           In the rare event that the  
15 collector will, at some point, earn a  
16 profit on a resale, that profit will be  
17 taxed. If the seller lives in New York or  
18 in another state where there is a state  
19 income tax, a total of 40 percent of the  
20 profit will be paid in taxes. To that  
21 must be added the proposed additional tax  
22 which we are discussing today.

23           It is proposed to raise taxes on  
24 gasoline in order to conserve on fuel by  
25 reducing consumption. There can be no

1  
2 real doubt that taxing art will also  
3 reduce sales of works of art. And the  
4 major effect will be to make those works  
5 which are already the most difficult to  
6 sell, works by younger artists, who are  
7 not well-known, who have not established  
8 themselves, even more difficult to sell.  
9 These are the artists who most need help  
10 and support, particularly now. Why should  
11 they be hurt in order that certain  
12 artists, who are, for the most part our  
13 most successful artists and have a  
14 secondary market for their work, receive a  
15 comparatively small share of the profit in  
16 the resale of a work. In a sense, this is  
17 a reverse Robin Hood proposal. It would  
18 take from the less successful artist to  
19 give to the more successful artist.

20           We need to provide incentives and not  
21 disincentives to the collection of works  
22 by living artists. It is only when more  
23 collectors come into the market, when more  
24 collectors are willing to spend their  
25 money to support living artists, that

1  
2 those living artists can hope to earn a  
3 greater living than they now do from the  
4 works which they sell. The proposal  
5 before us now is a deterrent and not an  
6 incentive to the collection of works of  
7 living artists.

8           It is interesting to note that  
9 the support for the tax on art comes  
10 almost entirely from persons who, although  
11 well-motivated and convinced that the  
12 proposed tax will benefit artists  
13 generally, have no actual hands-on  
14 experience in the art market.

15           There is also the vexing  
16 question of how the proposed tax is to be  
17 collected, distributed, and enforced -- and  
18 who will pay for this enforcement  
19 mechanism. There are some who will and  
20 have argued that the government should do  
21 this. There are some who have and will  
22 argue that private organizations,  
23 preferably their own, should do this for a  
24 profit. But no matter who does it, and  
25 how it is done, one thing is clear, some

1  
2 sort of bureaucracy will have to be  
3 created or expanded. Forms will have to  
4 be filled out, submitted, and processed.  
5 Computers will have to be employed. Money  
6 will have to be spent. And that money  
7 will ultimately come from the collectors  
8 who might otherwise use that money to  
9 acquire works of art. And, so, money,  
10 which might otherwise go to the support of  
11 art and artists will go to support a  
12 bureaucracy and a tax collection system  
13 for the benefit of a relatively small  
14 number of people, most of whom  
15 are already successful.

16 In the end, no matter how it is  
17 done, a system will have to be developed  
18 to track the sales of works of art.  
19 Assuming that the tax is to be levied on  
20 profits, not on losses, some method will  
21 have to be devised to verify the profit.

22 I was somewhat surprised and  
23 shocked to hear testimony today which  
24 suggests that the tax or the royalties  
25 should be paid on the gross selling price

1  
2 even where the collector suffers a loss.  
3 That the collector, in essence, would go  
4 out, take a chance on the artist, support  
5 the artist, pay the money, lose money, and  
6 then pay something to the artist in  
7 addition. I don't quite understand why  
8 that is fair, but that is something else.

9 I can tell you now, that record  
10 keeping, whether by artists or collectors,  
11 is not the long suit of the American art  
12 market. The long and short of it, is that  
13 whatever system of tax collection and  
14 enforcement is devised, it will be a  
15 further deterrent to the collection of  
16 contemporary art. This is especially true  
17 because many collectors do not wish their  
18 purchases and sales of art to be made  
19 public; they don't want their private  
20 affairs to be disclosed to the world and  
21 third persons. Like many of us, they  
22 value their privacy.

23 The filing of forms in  
24 Washington and elsewhere and the payment  
25 of fees for the filing of those forms is



1  
2 anathema to most Americans. And the  
3 filing of forms will be required if the  
4 tax collection system is to work,  
5 especially since more than 90 percent of  
6 sales of works by living artists are  
7 private sales and not sales at auction. I  
8 can assure you that any system for the  
9 registration of the sales of art in this  
10 country will be tremendously unpopular and  
11 will meet with real resistance from  
12 collectors.

13           There may be other systems  
14 suggested based upon one or another  
15 European model. But what works in a  
16 small, European country will not  
17 necessarily work here.

18           Those who suggest the French  
19 model might also consider whether the  
20 French market for contemporary art today  
21 has any real viability, and what has happened  
22 to the French market in the past thirty or forty  
23 years. It is not necessarily because of droit de  
24 suite, but Paris is certainly no longer a  
25 great center of contemporary art. The

1  
2 great centers of contemporary art are New  
3 York and London, which, curiously enough,  
4 are two of the jurisdictions which do not  
5 have the droit de suite.

6 What is most unfortunate about  
7 the proposal for this resale tax is that  
8 it divides the art community. The  
9 gentleman from VAGA who was here this  
10 morning to testify for the right conceded  
11 the artists members of his own  
12 organization are divided on the issue. It  
13 is by no means the case that all artists  
14 support the proposal. I must say it's  
15 difficult for anyone to say no when the  
16 government comes and says, "do you want some  
17 money?" Nevertheless, in the course of the  
18 Senate hearings, more than forty of America's  
19 most important artists submitted a  
20 statement in opposition to the proposal.

21 Let me read to you from a letter  
22 from Elaine de Kooning, who was married to  
23 Willem de Kooning, one of our greatest  
24 living artists. This letter, written  
25 shortly before her death, was in connection

1  
2 with the hearings on the Kennedy Bill.  
3 And I am quoting.

4 "Artists appreciate Senator  
5 Kennedy's efforts in their behalf, but it  
6 seems to us that one provision of the law  
7 he is proposing is counter-productive. It  
8 is a 'Fat Cat' provision which would  
9 benefit very few artists, those least in  
10 need of help, artists whose work has  
11 increased greatly in value over the years.

12 "It is comparable to the law  
13 subsidizing farmers with enormous holdings  
14 while small farmers are going bankrupt all  
15 over the country.

16 "The majority of artists who barely eke  
17 out a living (if they're lucky) from the  
18 sale of their work would not be helped by  
19 this law in any way. It would most certainly  
20 discourage collectors from buying art. I  
21 have not met a collector who is in favor of it.

22 "As it is, the bookkeeping  
23 involved in the sale of a single work of  
24 art is already burdensome: name of work,  
25 measurements, date, provenance, slides,

1  
2 photographs, price, commission, discounts,  
3 name and address of purchaser, date of  
4 sale -- all to go into an artist's file (if  
5 the artist is organized enough to have  
6 files).

7 "For the artist who sells his  
8 work, the bookkeeping entailed in  
9 registering each and every sale is  
10 appalling to contemplate. Buying or  
11 selling a work of art is not like buying  
12 or selling an automobile or a house,  
13 transactions that generally do not exceed  
14 one a year. The sale of fifty works during  
15 the space of one year might barely cover  
16 an artist's expenses. To be forced to  
17 register each one invokes George Orwell's  
18 1984. And one shudders to think of the  
19 governmental bureaucracy required to  
20 handle all the paperwork!

21 "Willem de Kooning -- certainly  
22 one of the artists who would most benefit  
23 from this law -- has seen work that he sold  
24 for a few hundred dollars in the forties  
25 and fifties re-sell for millions, of which

1  
2 he received not one penny. Yet he is  
3 against this law. He is happy that people  
4 who bought his work before he was famous  
5 are rewarded by the increase in value. It  
6 was these collectors who helped him to  
7 continue painting by enabling him to pay  
8 for art materials and food and rent when  
9 there were no critics to sing his  
10 praises. And his present value was  
11 established, after all, by subsequent  
12 collectors."

13 She suggests other laws, and I  
14 won't go into that.

15 MR. OMAN: You can submit it for  
16 the record, and it will be included as a  
17 permanent part of the record.

18 MR. EDELSON: Thank you, sir.

19 Likewise, let me quote a  
20 statement by Leo Castelli, which appeared  
21 in the New York Times on February 8, 1992.  
22 For the benefit of those who may not have  
23 heard of Leo, let me say that he is the  
24 dean of American dealers in works of  
25 living artists, whose devotion to artists



1  
2 over the years is well-known. Leo  
3 said of the proposal, and I am quoting:  
4  
5 "I think it would have the same kind of  
6 lack of success if it were developed  
7 nationally; it's just interfering with the  
8 freedom of exchange, and that never  
9 works."

10 Finally, I want to respond to  
11 the argument most frequently made in  
12 support of the proposal for mandatory  
13 profit sharing, or the resale royalty, or  
14 whatever else it can be called. That  
15 argument, briefly stated, is that it is  
16 only fair that the artist who creates a  
17 work and sells it to another should share  
18 in the monetary reward which results from  
19 the artist's creative genius -- that it is  
20 unfair that the artist, who is really  
21 responsible for the profit, should receive  
22 nothing for his or her efforts.

23 But artists do profit when their  
24 works are resold at higher prices.  
25 Frequently, artists still hold in their possession



1  
2  
3 works which they have created, which become  
4 more valuable. Second, the artist shares  
5 because his or her later works are also  
6 sold at higher prices. Finally, since  
7 most works decline in value, one may ask  
8 whether the artist should participate in the  
9 profits, but not the losses. No one  
10 expects the artist to share in a loss,  
11 that would be unfair. The risk of loss is  
12 and should be entirely on the collector.  
13 But if the collector bears the risk of  
14 loss, as he or she should, why should the  
15 collector not be entitled to the entire  
16 profit as a reward for his or her  
17 considerable risk. This is fair for the  
18 collector, whose purchases ultimately  
19 support the artist. It is important that  
20 artists be treated fairly. It is also  
21 important that collectors be treated  
22 fairly.

23                   How, for example, would  
24 collectors react to a proposal that they  
25 must pay an artist even when they lose

1  
2 money in supporting the artist. Somebody  
3 mentioned before what about inflation,  
4 suppose a collector buys a work in 1980  
5 for a thousand dollars and sells it in  
6 1992 for \$1200, most of that is probably  
7 inflation. Why should the collector pay a  
8 tax on that?

9               We know from the experience of  
10 Eastern Europe that government  
11 interference in the market, however  
12 well-meaning, can have serious  
13 consequences. A government must,  
14 therefore, interfere only with great care,  
15 lest more harm than good result from its  
16 action. This is such a case.

17              There is much that can and  
18 should be done for our artists, who are a  
19 great treasure and material resource.  
20 Improved health care, which has been  
21 mentioned, for example, comes to mind.  
22 There are many things that the government  
23 can do to help artists who need help. The  
24 proposal for a tax on art, for mandatory  
25 profit sharing, will help those artists

1  
2 who least need help, at the expense of  
3 those who most need it.

4 For this reason, we oppose the  
5 proposal as unworkable and ultimately not  
6 in the best interest of artists.

7 Thank you.

8 MR. OMAN: Thank you very much,  
9 Mr. Edelson.

10 Our cleanup hitter today is Mr.  
11 Zuckerman. Mr. Zuckerman, you have the floor.

12

13 MR. ZUCKERMAN: Stephen and Gil  
14 did such a good job that I am inclined to  
15 sit here and say I am persuaded and then  
16 shut up because I can add very little to  
17 the theoretic argument.

18 If I can add any value at all, it  
19 is to speak to you as somebody who is in  
20 the middle of the resale market. We are  
21 the world's largest resale market maker.  
22 And I'm here to tell you today that as  
23 somebody who makes his living 12 or 14  
24 hours a day doing what everybody else is  
25 talking about, we are absolutely convinced

1  
2 that if an additional tax is imposed on  
3 top of the state and federal income tax it  
4 will simply depress prices, it will impair  
5 the market, and it will send business away  
6 from the United States and back to European  
7 jurisdictions which have not imposed the  
8 tax. We know that differences as small as  
9 two or three percent in a commission,  
10 in a competitive situation where we  
11 are trying to win business from another  
12 auction house, will either attract or  
13 deflect a business elsewhere.

14 Sellers have many choices of  
15 where to bring their property for resale,  
16 but the art market, as others have said,  
17 is indeed global. Major works of art are  
18 highly portable and will be taken to the  
19 jurisdiction in which the cost of the  
20 transaction is the smallest. This is  
21 simply a fact of economic life.

22 However well-motivated the  
23 objective of the resale royalty is, we can  
24 tell you that it will have precisely the  
25 opposite effect. This point ought to be

1  
2 weighed very seriously by the legislature  
3 when it considers the resale royalty.

4 I would just like to point out a  
5 few other studies, and I don't know  
6 whether they have been quoted yet.

7 From having made a review of  
8 this a couple years ago when the Kennedy  
9 Bill was introduced, I learned that droit  
10 de suite legislation was first passed by  
11 France in 1920. And I think it has since  
12 been enacted by Chile, Luxembourg, Norway,  
13 Portugal, Turkey, Belgium, Czechoslovakia,  
14 Poland, Uruguay, Italy, Germany, and  
15 Morocco. None of those countries today is  
16 known for its thriving contemporary art  
17 market.

18 In 1977 we found that a  
19 committee of the House of Commons in  
20 England undertook a very comprehensive  
21 review of copyright laws around the world,  
22 specifically looking at droit de suite  
23 legislation, so that they could make a  
24 recommendation to the Parliament as to  
25 whether or not a provision similar to the one



1  
2 currently proposed should be adopted. I  
3 would like to read to you its conclusion  
4 about the resale royalty. "Having  
5 considered all of the relevant matters we  
6 find ourselves unable to recommend the  
7 introduction of droit de suite in this  
8 country. Our view is that it is not  
9 necessarily fair or logical, and that the  
10 main lesson to be drawn from the  
11 experience in other countries is that  
12 droit de suite is just not practical,  
13 either from the point of view of  
14 administration or as a source of income to  
15 individual artists and their heirs." My  
16 own colleagues in Europe report that the  
17 practical experience of Germany with its  
18 laws is that the cost and administrative  
19 burdens greatly exceed the revenues  
20 collected. We also understand that the  
21 relevant authorities in Italy, Belgium,  
22 and Germany are recommending the abolition  
23 of those laws in those countries.

24 I would like to close my remarks  
25 simply by quoting a statement made in 1978 by



1  
2  
3 Representative Henry Waxman of California  
4 at the time he introduced the first  
5 Resale Royalty Bill in the United States House of  
6 Representatives. Then he said,  
7 "The benefits to be gained by visual  
8 artists by Congressional recognition and  
9 by enactment of royalties for them may be  
10 outweighed by the harm done."

11  
12 I would like to say that we  
13 share that concern. We think that some  
14 empirical study ought to be done, as has  
15 been previously said, and we are  
16 absolutely convinced that an additional  
17 tax will not work, and it will impair the  
18 market and not enhance it, and that what  
19 impairs the market cannot possibly be good  
20 for working artists.

21 Thank you.

22 MR. OMAN: To accept your  
23 premise we must concede that artists don't  
24 recognize their own self-interest, that  
25 they are doing something that will hurt

1  
2 their livelihood in the long run.

3 MR. ZUCKERMAN: Well, lots of  
4 artists, as Gil has said, recognize that  
5 the imposition of a tax on the market will  
6 hurt their --

7 MR. OMAN: Certainly, the French  
8 have had the resale royalty since 1920.  
9 And, certainly, even though you contend --  
10 and some would probably disagree with you  
11 -- that Paris is not now the center for  
12 the modern art market, which did raise a  
13 few eyebrows when you said that, still in  
14 the 1920's and 1930's Paris was the center  
15 and the resale royalty did not seem to  
16 inhibit it.

17 MR. ZUCKERMAN: We would have to  
18 look back to the 1920's and 1930's and see  
19 how much resale royalty was actually being  
20 collected.

21 MR. OMAN: I agree that an  
22 empirical study is reasonable.

23 MR. EDELSON: I always say to  
24 people who ask me: Name me the most  
25 important living artists.

1

2           MR. OMAN: It's a long list,  
3 but I would not want to presume. I am not  
4 an expert in the field, and we do have  
5 experts. If you would like to have an  
6 extended discussion, I suspect there are  
7 three people here who would love to engage  
8 you in that discussion.

9           MR. ZUCKERMAN: Again, I am just  
10 testifying as a market maker. If the tax  
11 is imposed, the market, to a large extent,  
12 will go elsewhere. That has been our  
13 experience. And if that is what the  
14 public policy desires, then the tax should  
15 be implemented; but I can't believe that  
16 is the intended consequence or that it  
17 would be good for artists.

18           MR. OMAN: I'm not quibbling  
19 with your premise, I am just saying it suggests  
20 that there are a lot of artists that  
21 aren't able to identify their own self-interest,  
22 which is a difficult argument to make.

23           MR. EDELSON: What is to divide it?  
24 There is, by no means, unanimity  
25

1  
2 among artists about this, as we have  
3 pointed out.

4 MR. OMAN: Right.

5 MR. EDELSON: There are artists  
6 for and against it. And, as I said  
7 before, it's awfully difficult to say no  
8 when the government comes to you and says,  
9 would you like to have some money.

10 MR. ZUCKERMAN: But as Gil  
11 pointed out, there are two sides. There  
12 are the artists who produce and the consumer  
13 who buy. And based on our daily experience with  
14 the consumer who buys and sells, and I am  
15 telling you how they behave; the artists  
16 may not realize it.

17 MR. OMAN: Let me make one  
18 additional point. As the Register of  
19 Copyrights, I feel an institutional  
20 obligation to make the point that we were  
21 an extremely efficient administrator of  
22 similar funds when we collected \$200  
23 million for the cable television  
24 industry. Our overhead is less than one  
25 percent. And we are very proud of the

1  
2 fact that we are lean and mean and getting  
3 more so every day.

4 Mr. Patry.

5 MR. PATRY:

6 My first question is for Mr.  
7 Weil. One of the arguments that you make,  
8 and others who have been opposed to droit  
9 de suite make, is that this will actually  
10 benefit a small number of people, and the  
11 most successful artists.

12 I believe in the written  
13 material it was mentioned that at  
14 Sotheby's and Christies, generally, you  
15 have to sell your work for \$10,000 or  
16 more. And there's, what, 219 American  
17 living artists who sold through Sotheby's  
18 and Christies last year, which,  
19 admittedly, is a small number.

20 If there was a law, however,  
21 that applied not just to Sotheby's and  
22 Christies, but to other auctions, and  
23 certainly to galleries, the number of  
24 artists who might benefit would be  
25 larger. Do you agree or not?

1  
2           MR. WEIL: I think the number  
3 would certainly be larger; but the  
4 question is, if you were really passing a  
5 law, let's multiply by ten the number of  
6 artists who might benefit. So, we may be  
7 talking about one percent. And let's  
8 double that and talk about two percent,  
9 and say we are talking largely about sales  
10 maybe at the level of \$400 or \$300. So,  
11 we may be looking at rights of what -- I  
12 mean, is this what we need at this point,  
13 to set up an enormous apparatus to benefit  
14 what is still relatively a handful of  
15 people?

16           Let me just say, if we wanted to  
17 do something for contemporary artists we  
18 could do something very similar, we could  
19 put a discriminatory tax on older art.  
20 Let's say art made before 1900 carries a  
21 sales tax or art tax that was two percent  
22 higher than anything else, and that went  
23 to older art. Then we would be doing  
24 something to benefit, really, a very small  
25 number of people.



1

2           MR. PATRY: Well, your argument  
3 is a variant of the trickle down theory.  
4 You propose to benefit the people  
5 who can afford to buy art, but not to  
6 benefit artists directly.

7

8           Are you really saying that you  
9 don't believe droit de suite is worthwhile  
10 for artists who make a small amount of money,  
11 so that we shouldn't bother with them at all?

12           Let me just give you an example. In  
13 San Francisco an artist, Richard Mayer, said  
14 that, yes, indeed he took that small amount of  
15 money and reinvested it in supplies and  
16 made more money. Is that --

17

18           MR. WEIL: Let me answer. And  
19 there is an anecdote within an anecdote,  
20 because there was a reference in the  
21 testimony earlier to the fountain in  
22 Ghiradelli Square. What needs to be told is  
23 the fountain was not sold, the real estate  
24 project, Ghiradelli Square, was sold, and  
25 included among the many, many parts of

1  
2 Ghiradelli Square was the fountain by Ruth  
3 Saswa. And Ruth raised a claim of \$5,000  
4 because her fountain was there. The  
5 overall price of Ghiradelli Square was many  
6 of millions of dollars. That was a large  
7 real estate transaction.

8 We are dealing here with  
9 incidents which really constantly take us  
10 away from the questions who is really  
11 going to benefit, who is going to pay.

12 MR. PATRY: I would actually say  
13 that your example was more of an anecdote  
14 away from what mine was.

15 MR. WEIL: Okay.

16 She did testify at the hearing.  
17 And my understanding is that they  
18 ultimately gave her what the cost of the  
19 material would have been if they created  
20 it at the time.

21 MR. PATRY: But my question was  
22 this: Should we say to Richard Mayer,  
23 because you would only get \$100 for this  
24 particular work it's not worth it for us  
25 to give it to you, even though you might

1  
2 reinvest it in creating a new work?

3 MR. WEIL: If the cost of that  
4 were jeopardizing the art market as it is,  
5 I would say that.

6 MR. PATRY: And how would giving  
7 Richard Mayer \$55 jeopardize the art  
8 market?

9 MR. WEIL: Because I think this  
10 money is not going to come out of thin  
11 air, it's going to come out of somebody's  
12 pocket, and somebody is going to react.  
13 And we don't know what those circumstances  
14 are.

15 MR. PATRY: Let me turn your  
16 example around. If droit de suite is paid on  
17 a higher amount for a more expensive work,  
18 presumably that is a person who can afford  
19 the amount. Obviously, it's a matter  
20 of degree. If you are talking about a 25  
21 percent droit de suite, or even a 15  
22 percent, that Mr. Haacke got, that is a  
23 fair amount of money. If you are talking  
24 about three percent like it is in France,  
25 and it's three percent on a sale of work

1  
2 of art by somebody who can afford to pay a  
3 million dollars, or something, it's not  
4 self-evident, at least, that that three  
5 percent is an imminent danger to the art  
6 market.

7 MR. ZUCKERMAN: That is like  
8 arguing that New York ought to raise its  
9 incremental tax rate on the top ten  
10 percent of its wage earners.

11 Do you think they are not  
12 portable, they won't go elsewhere?

13 The point I am trying to make  
14 is, you don't just look at the one artist  
15 who gets \$100. If you impose a structural  
16 range on the economics of the market  
17 you'll do something radical which will  
18 upset the very functioning of that  
19 market. You need to be sure if you impose  
20 the tax that the transactions will still  
21 occur.

22 MR. EDELSON: Don't you  
23 think if you raise the New York sales tax,  
24 which is now eight-and-a-quarter percent, by  
25 three percent, that the increase would have

1  
2 an effect on sales in New York?

3 MR. PATRY: I wanted  
4 to find out what are the current taxes and  
5 commission fees on works of art that you  
6 sell. For dealers, what  
7 is the average commission that a dealer  
8 charges for a sale of a work?

9 MR. EDELSON: Is that in the  
10 primary market or resale?

11 MR. PATRY: Well, I would  
12 be interested in both.

13 MR. EDELSON: Well, it depends  
14 on the art. For some artists it's as low  
15 as 33 percent or as high as 50 percent,  
16 depending on the saleability of the  
17 artists.

18 And on a resale it's obviously  
19 negotiable. It could be anywhere from  
20 five percent to 15 to 20 percent,  
21 depending, again, on the work and the  
22 value of the work.

23 MR. PATRY: Have those  
24 figures been fairly standard?

25 Has it been that way

1  
2 for the last three years or --

3 MR. EDELSON: I think by and  
4 large the commission may go up slightly,  
5 especially in the primary market, because,  
6 as you know, it is an extremely risky  
7 business.

8 As a matter of fact, our experience  
9 is that most fewer than 25 percent galleries  
10 who are dealing in contemporary art -- the  
11 riskiest kind of art to sell -- do not  
12 last for five years. It is an extremely  
13 risky business and not a terribly profitable  
14 business.

15  
16 MR. PATRY: When those  
17 commission fees went up, did people  
18 undertake an empirical study to decide  
19 whether the increase in those commission  
20 fees would depress the market, jeopardize  
21 the market, or send the sales to other places  
22 that had lower commissions?

23 MR. EDELSON: Yes. But one  
24 thing that the dealers recognize is that  
25 they are also competing with my friend,



1  
2 Mitchell Zuckerman, at the auction house,  
3 and if their commission goes up those  
4 people will go to the auction house.  
5 If the auction houses in the United States  
6 don't make them a decent offer, they will  
7 go abroad.

8               So, yes, indeed, the commission  
9 rate that dealers charge on a resale is  
10 very much in tune. And to the extent that  
11 they do raise that they stand to lose  
12 business, absolutely.

13              People in that market are very  
14 conscious of how much will it cost me, and  
15 it makes economic sense. Nobody likes to pay  
16 taxes. And -- you know -- taxes are  
17 the price of civilization, but it's  
18 one thing to say it in the abstract, and another  
19 thing to want to pay it.

20

21              And I am afraid that  
22 it's easy to say to collectors, well, you  
23 are wealthy, you can afford it. It's  
24 easy to say that to somebody who is  
25 wealthy, boy, you are rich, you can

1  
2 afford that. Then watch them come back  
3 at you.

4 MR. OMAN: I remember several  
5 years ago in connection with the opening  
6 of the Hirshhorn Museum in Washington,  
7 Barbara Walters interviewed Joseph  
8 Hirshhorn. She leaned forward, looked  
9 him earnestly in the eye, and said, "what,  
10 Mr. Hirshhorn, has given you the utmost  
11 satisfaction?", expecting him to say  
12 building a wonderful art collection or  
13 building a great museum. And he said,  
14 "Well, Barbara, that is easy, it was making  
15 all the money."

16 We have spent a great deal of time here  
17 today talking about money and very  
18 little about art.

19 MR. EDELSON: I can say  
20 something else about Joe Hirshhorn; he,  
21 by the way, never made money on art, that  
22 I know of, and he gave it to the country,  
23 which I think is a great thing. If you  
24 were trying to sell to Joe Hirshhorn,  
25

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2  
3  
4 he was very conscious of the price he paid,  
5 and if you didn't meet his offer he went  
6 somewhere else. Frequently -- and  
7 this is true of many collectors today --  
8 there is considerable negotiation involved  
9 in the sale of works of art, considerable  
10 negotiation, and, yes, discount prices and  
11 increases are all important.

12 This is not only the case,  
13 by the way, with people who are  
14 speculators or investors; it is true of  
15 collectors as well.

16 MR. PATRY: Just to make sure I  
17 understand, what fees are charged to  
18 buyers by auctions on average?

19 MR. ZUCKERMAN: At most auctions  
20 in London, New York, and in the United  
21 States, the transaction cost is split  
22 fairly evenly between the seller and the  
23 buyer. We, for example, charge a  
24 standard commission of ten percent to the  
25 seller and a standard commission of ten

1

2 percent to the buyer.

3

Now, in making the --

4

MR. WEIL: Sales tax.

5

MR. ZUCKERMAN: I'm coming to

6

that.

7

In making this economic

8

decision, we can't make a market unless

9

people bring us things to sell. Our

10

business is entirely supply-driven in the

11

resale market because we are a broker.

12

What I'm talking about is

13

our very serious concern that a tax will

14

deflect sellers. The seller brings his product to

15

the market, he has to pay the commission,

16

the capital gains tax, and the commission on

17

resale. And there are sales taxes and

18

other costs associated with the transaction.

19

20

21

A buyer who does not have a resale

22

certificate in New York City has to pay

23

an 8-3/4 percent sales tax, and

24

whatever other costs are incurred in

25

moving the art from the auction floor to

1  
2 his floor. The same thing occurs when he buys  
3 from a dealer. So, transaction costs  
4 here, compared to other venues in the  
5 world, are already significant.

6 If you layer additional transactional  
7 costs on top of that, it is  
8 absolutely certain that you will deflect  
9 some portion of business elsewhere  
10 into jurisdictions with lower  
11 transaction costs.

12 MR. PATRY: What if the European  
13 Community were to adopt a resale royalty,  
14 that would include England?

15 MR. ZUCKERMAN: Yes. We'd be  
16 very happy about that, because our business  
17 would increase, and that would be  
18 good for the artists.

19 And then, you are right, people  
20 would have no place else to go, and the  
21 entire sea level would rise altogether.  
22 So, if you want to do it here you've got to  
23 make sure you do it in the other places in order  
24 not to drive more business underground. Driving  
25 businesses underground doesn't benefit the artist

1  
2 nor those of us in the above-ground economy.

3  
4 MR. WEIL: I think it's also  
5 noteworthy that the Swiss Legislature just  
6 voted down a droit de suite. I would  
7 imagine that the Swiss Legislaure  
8 envisioned Switzerland continuing to  
9 be an art market haven for just that  
10 reason.

11 MR. EDELSON: The other problem  
12 with the droit de suite, of course, is  
13 that it certainly doesn't provide an  
14 incentive to collect contemporary art.

15 People who care about art care  
16 about a lot of art, and they are also  
17 movable from one area to another.

18 MR. OMAN: Any other questions?

19 MR. PATRY: No.

20 MR. OMAN: Thank you all very  
21 much. It was a provocative panel. We are  
22 grateful for your views, and they will be  
23 fully considered in the course of  
24 preparation of the report.

25 I thank all of the witnesses for



1

2     their excellent presentations.

3

4             We have a great deal to consider  
5     as we prepare our report.

6

7             Thank you all very much.

8

9             The hearing stands in recess  
10     subject to the call of the chair.

11

12             Thank you.

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14             (Time noted: 4:00 p.m.)

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END

4-29-93